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THE

LAW OF EVIDENCE

IN

BRITISH INDIA.

BY

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LAW OF EVIDENCE

BY THE SAME AUTHOR.

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WITH A GENERAL INTRODUCTION TO THE STATUTE LAW OF INDIA.

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PREFACE.

THIS is rather a new book than a new edition, the contents having increased three-fold, and the matter of the first edition (so far as it is now relevant) having been recast in a new shape. A Code of Evidence, constructed with special reference to the requirements of the country, has now been substituted for the former fragmentary and unsatisfactory state of the law described at pages 15—17 of the following *Introduction*. So important a change in the subject-matter of the work has necessitated a change in the plan and object of the work itself. This plan and object may now be thus described.

The Evidence Act, like every Code, consists of a number of abstract rules. In order to understand fully these rules, a knowledge of principles is required, which cannot be conveyed by the provisions of an Act of the Legislature, and which must be acquired from sources *dehors* any such Act. The meaning, the object, the proper application of a rule will be better and more fully comprehended in proportion as the origin, the development, and the history of the principles upon which it is founded are known and understood. Acquaintance with the stages through which it has passed, and the alterations to which it has been from time to time subjected, can alone account for and explain its present shape and the language in which it has been finally promulgated. Every word of the abstract proposition in which it is expressed has been deliberately chosen with reference to some decided case, to some doubt that has been raised and solved, to some improvement introduced, to some alteration deliberately made. I have endeavoured in the following pages to supplement the Act itself with this information so necessary to its full comprehension. The Act has been expressly based upon the English Law of Evidence, modified to suit the requirements of India. I have referred to

English cases to explain the origin and nature and development of the principles of English law—I have referred to Indian cases to show where and why these principles have been modified in applying them to India. If I have gone somewhat further and referred very largely to cases decided by the Privy Council and by the highest courts in India upon matters in respect of which the new Act has expressly promulgated a rule before tacitly followed rather than introduced any change; or upon matters which a scientific treatment might put aside as not properly belonging to the province of *Evidence*—I trust that my unscientific dealing with the subject will find with my critics some apology in the light thrown by these *surrounding circumstances* upon the subject itself. In truth, I have willingly sacrificed the scientific to my conception of the useful. The student who comes to read with a previously acquired stock of English knowledge only, will, I trust, find the advantage of having this knowledge placed in juxtaposition with Indian things and Indian cases, which will be the more readily understood by means of this juxtaposition, and the light thus struck by comparison. The native of India, who is not conversant with the English system on which the Act is based, and by whom therefore the abstract language of the Act must be less readily comprehended, will, I hope, be materially assisted by having this abstract language applied to and explained by things and cases which he does understand. The judicial functionary of some standing who may have dreaded the (to him) difficult task of unlearning the old and learning the new, will be, perhaps, surprised to find how very little of what is really new the Act contains; and how much consists of 'old friends with new faces.' The most important changes which he will find—and these can be to him no unpleasant ones—are that rules, which were before followed doubtfully and without authority, are now authoritatively laid down for his assistance and guidance—and that system and method and uniformity have been substituted for confused and isolated rules of uncertain and doubtful appli-

cation I have endeavoured to explain and illustrate each principle involved with sufficient fulness to make the work sufficiently elementary in character to suit the requirements of those who approach the subject for the first time and without any previous acquaintance therewith.

The second Section of the Evidence Act expressly saves *the provisions of any Statute, Act, or Regulation in force in any part of British India and not expressly repealed by the Evidence Act itself.* I have endeavoured to include in this volume all outstanding rules of evidence thus expressly saved and to be found scattered through the Acts of Parliament applicable to India, the old Regulations, the Acts of the Supreme Legislative Council of India, and the Acts of the local Legislative Councils of Bengal, Madras, and Bombay. A glance under the titles ACT, REGULATION, STATUTE, in the Index will give an idea of the extent of the work done in this direction. I have some confidence that nothing has been omitted, though it may be that I have included somewhat that, in the opinion of some, might as well have been left out. The text of the Act has been reprinted with the greatest care from the copy published in the *Gazette.* The amendments made by Act XVIII of 1872 have been introduced into the text, which can therefore be depended upon as containing the law exactly as it stands at the time of the publication of this edition.

The Indian Evidence Act is one of the latest additions to that body of codified law, the first portion of which, *viz.*, "*The Code of Civil Procedure*" (Codification of adjective civil law), was enacted in 1859. *The Indian Penal Code* (Codification of substantive criminal law) followed in 1860. *The Code of Criminal Procedure* (Codification of adjective criminal law) was first passed in 1861, and has been re-enacted in an amended and improved form in 1872. Portions of substantive civil law have been codified in "*The Indian Succession Act*, 1865," "*The Indian Divorce Act*, 1869," and "*The Indian Contract Act*, 1872" The work that is thus being done in British India will hereafter form an important

page in the history of Great Britain, and its effects will, in all human probability, react upon England herself. When Rome allowed the Prætor's edict to modify and temper the *jus civile* with the broader principles of the *jus gentium*, making a necessary concession to her own progress and to the wants of the many new citizens, which were added to her ever-widening circle, she laid the real foundation-stone of that grand structure which has outlived the ruin and fall of her material empire. The *jus honorarium*, offspring of the union of the *jus civile* and the *jus gentium*, not only fulfilled the requirements of its own time and nation, but also generated that system of law which to this day exercises its influence upon Europe. So it may well be that the work which England is doing in India will in time react upon herself and bring about that simplification and codification which have been long spoken of, but the accomplishment of which has been beset by difficulties hitherto insuperable. If this result is ever to be realized, and if it is to be at all attributable to the success of the Indian Codes, that success must be indubitable. In order to achieve such a success, the Codes must be administered by men whose education in law is not merely limited to the letter of the Codes themselves. The rule itself will be often misunderstood where the reason of the rule is not known. Those will best understand and apply the rule who know the object and intention with which it was framed, and with which the language in which it is expressed was selected. Language, like other things human, is imperfect; and how great soever be the precision with which it is chosen, however superior be the skill of the draftsman, the language of every Code needs to be supplemented by the knowledge just described, and the mind of the reader to be trained by the study thereof. The following pages are an attempt to put this knowledge in an accessible shape and so contribute to the end indicated, so far as concerns one portion of the codified law of India.

June 2nd, 1873. C. D. F.

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Bourke's Reports (Calcutta High Court, Original Side)	Bourke Rep.
Hyde's Reports, Vols. I, II (Calcutta High Court, Original Side)	Hyde Rep.
Coryton's Reports, Vols. I, II (Calcutta High Court)	Cor. Rep.
Hay's Reports (Calcutta High Court, Appellate Side)	Hay Rep.
Decisions under the Rent Laws of the Court of Sádr Diwání Adálat and of the High Court (Calcutta), selected by the Board of Revenue, Vol. I., 1865 (Reports from December 1860 to December 1863)	Rent Law Rep.
Revenue, Judicial and Police Journal (Calcutta High Court), Vols. I—V (August 1863 to November 1865) . . .	R. J. & P. J.
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Revenue, Civil and Criminal Reporter (Calcutta High Court), Vols. I—V (November 1865 to May 1868) . . .	R. C. & C. R.
Marshall's Reports (Calcutta High Court), Vol. I (July 1862 to July 1863) . .	Marsh. Rep.
Sevestre's Reports in continuation of Marshall's Reports (August 1863 to December 1863)	Sev. Aug.-Dec. 1863.
Sutherland's Reports in continuation of Marshall's Reports (January 1864 to July 1864)	Suth. Rep. Jan.-July 1864.

Sutherland's Rulings on References from Mofussil Small Cause Courts (Calcutta High Court, October 1861 to August 1865)	Suth. S. C. C. Ref.
Sutherland's Weekly Reporter, Special Number (Calcutta High Court, July 1862 to July 1864)	W. R. Special No.
Sutherland's Weekly Reporter (Calcutta High Court), from August 1864 to date —Civil Rulings	W. R. Civ. Rul.
Ditto ditto—Decisions of the Privy Council	W. R. P. C.
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N. B.—The Weekly Reporter commencing with Vol. VII consists of three parts as above.

Indian Jurist, Old Series (Calcutta High Court)	Ind. Jur. O. S.
Indian Jurist, New Series (Calcutta High Court, January 1866 to September 1867)	Ind. Jur. N. S.
Bengal Law Reports (Calcutta High Court, June 1868 to date)—Decisions of the Privy Council	B. L. R. P. C.
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N. B.—The Bengal Law Reports commencing with Vol. V consist of one Part only and an Appendix.

Full Bench Rulings, Supplemental Volume to the Bengal Law Reports, Part I (February 1863 to June 1865) . .	B. L. R. Sup. Vol. F. B.
Reports of the Madras High Court . .	Mad. H. C. Rep.
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INTRODUCTION.

§ 1. THE functions of a Court of Justice are twofold, *viz.*, 1*st*, to ascertain the existence or non-existence of certain facts; 2*nd*, by applying the *substantive* law of the land to the facts thus ascertained, to declare the rights or liabilities of parties in so far as they are affected by such[1] facts. For example, in a criminal trial it must first be ascertained whether the prisoner committed certain acts or was guilty of certain omissions;[2] and if it be shown that he did commit such acts or was guilty of such omissions, the Court proceeds to annex the legal consequence, *viz.*, declare him liable to a certain punishment. In a civil trial, in the same manner, the Court has first to ascertain whether the parties did certain acts, or whether a certain state of things[3] exists,—as for instance, whether the defendant executed to the plaintiff a certain bond; or whether the plaintiff is the legitimate son of a certain person, and, therefore, rightful heir to certain property, to which he asserts that he is entitled under the laws of inheritance; or whether a certain house is out of repair, in respect of which damages are claimed from a tenant who had covenanted to keep it in repair; or whether a certain stream is fordable which separates accreted soil from the plaintiff's estate (see Bengal Reg. XI of 1825). The execution or non-execution of the bond, the state of repair or non-repair of the house having been established, the Court annexes the legal consequence, *viz.*, declares the

Functions of a Court of Justice.

[1] I do not regard the *enforcement* of the rights or liabilities thus declared as one of the proper functions of a Court of Justice. In civil cases in India the Courts perform this duty, but it is really a ministerial duty.

[2] See Section 32 of the Indian Penal Code.

[3] The definition of "fact" in the Indian Evidence Act includes a "state of things." See Section 3.

defendant liable to pay or not to pay a certain amount of money. The fact of legitimate sonship, or the fordability or non-fordability of the river being proved or disproved, the Court declares that the plaintiff has or has not a right to the possession of certain property. If the facts of each case were undisputed, if there was no contention as to whether certain acts had been committed, or as to whether or not a certain state of things existed, the Court would merely have to apply the substantive law and to declare the consequences resulting from such application,—a duty which, though it might occasionally be one of considerable difficulty, would, in the great majority of cases, be sufficiently simple. But men, through misinformation, mistake, misunderstanding, and human imperfection, and occasionally from less excusable causes, scarcely ever admit or are agreed about the *facts;* and the Court, before it can apply the *substantive* law, has to sift out from a mass of contradiction, misconception, error, often stupidity, and sometimes dishonesty, fraud, and falsehood, the true state of the *facts* upon which it is called to adjudicate. The means whereby the Court informs itself of the existence of these facts is called EVIDENCE.[1]

Meaning of the word "Evidence."

§ 2. The word "evidence" is derived from the Latin word "*evidens*," "*evidere*," which means "to show clearly; to make clear to the sight; to discover clearly; to make plainly certain; to ascertain; to prove."

[1] "Every judicial proceeding whatever has for its purpose the ascertaining of some right or liability. If the proceeding is criminal, the object is to ascertain the liability to punishment of the person accused; if the proceeding is civil, the object is to ascertain some right of property or of *status*, or the right of one party, and the liability of the other, to some form of relief. All rights and liabilities are dependent upon and arise out of *facts*, and facts fall into two classes, those which can, and those which cannot, be perceived by the senses."—*Report of the Select Committee on the Evidence Bill.* See *post*, p. 22.

"In order that the Judge may decide upon a question in litigation, it is necessary that the parties to the action should satisfy him of the truth of the *facts* submitted for his decision. But they must not only satisfy the Judge; they must also prove the *facts* adduced. Facts that must be proved, and such as affect and are relevant to the decision to be given are uncertain facts,—that is, such as are disputed by the other party."—*Modern Roman Law, by Tomkins and Jencken*, p. 92.

"Evidence," says Blackstone, "signifies that which demonstrates, makes clear, or ascertains the truth of the very fact or point in issue, either on the one side or on the other."

"The word evidence," says Mr. Taylor, "includes all the legal means, exclusive of mere argument, which tend to prove or disprove any matter of *fact*, the truth of which is submitted to judicial investigation."

Substantive and Adjective Law.

§ 3. Mr. Bentham has used the phrase '*substantive law*' to designate that law which the Courts are established to administer as opposed to the rules according to which this substantive law is itself administered. These last, or the rules of procedure or practice, he has termed "*adjective law*." What Mr. Bentham calls 'substantive law,' was styled in a report presented to the Prussian Government in 1811, '*material law*;' and what Mr. Bentham calls 'adjective law' was there styled "*formal law*." The former metaphor is drawn from the language of the *grammarians;* the latter from that of the *logicians*.[1] The "Indian Penal Code" (Act XLV of 1860, amended by Act XXVII of 1870) is substantive law, and together with some other provisions contained in various *special*[2] and *local*[3] laws, forms the whole of the substantive criminal law administered in British India. The Code of Criminal Procedure (Act X of 1872) is, on the other hand, adjective law. So also the Code of Civil Procedure (Act VIII of 1859, amended by

Examples.

[1] Substantive law, or the law which the Courts are appointed to administer, is called by the French lawyers *le fonds du droit:* adjective law, or the rules according to which the substantive law is to be administered, they call *la forme*. Mr. Austin does not like the phrases 'substantive law' and 'adjective law,' though he uses them largely in elucidating his own plan. His objection against them is that they suggest a wrong basis of division according to his very elaborate conception of what a scientific division should be. See Lectures xxxv and xlv, pp. 611 and 788 of edition of 1869, by Mr. Robert Campbell.

[2] "A 'special law' is a law applicable to a particular subject."—Section 41 of the Indian Penal Code.

[3] "A 'local law' is a law applicable only to a particular part of British India." — 42, *id.*

Act XXIII of 1861 and other Acts[1]) is adjective law. The substantive Civil law of British India has not as yet been codified. It is to be found in various Acts[2] of the Indian Legislature, in the Hindu and Mahomedan law;[3] and, for cases not thus provided for, in the broad rule of *justice, equity, and good conscience*[4] prescribed to the Civil Courts in India as the rule of decision from the time that such Courts were first established under British rule. To these must be added, in so far as relates to the Pre-

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[1] See the Author's "Chronological Table and Index to the Indian Statute Book," under Act VIII of 1859.

[2] Those curious to follow out the subject can complete a list of these Acts by referring to the Author's "Chronological Table and Index to the Indian Statute Book," Title "CIVIL LAW" in *Index*.

[3] Questions regarding succession, inheritance, marriage, or caste, or any religious usage or institution, are to be decided according to Mahomedan law where the parties are Mahomedans, and according to Hindu law where the parties are Hindus, except in so far as such law has by Legislative enactment been altered or abolished, see Section 24 of the Bengal Civil Courts Act (VI of 1871) for the Provinces under the Lieutenant-Governors of Bengal and the North-Western Provinces; Section 5 of Act IV of 1872 for the Panjáb; Section 16, clause 1, Regulation III of 1802 for the Madras Presidency; Section 26, Regulation IV of 1827, which substitutes in the Bombay Presidency "the usage of the country in which the suit arose—if none such appears, the law of the defendant;" Section 31, Act XXXII of 1871 for Oudh; and Section 6, Act VII of 1872 for Burmah. For the High Courts in the exercise of their *Ordinary Original Civil Jurisdiction*, see clause 19 of the Charter of 1865 of the Bengal High Court (which must be read with clause 18 of the Charter of 1862, and with the letter from the Judges of the old Supreme Court, dated 16th October 1830, which will be found at p. 22, Vol. I of Morley's Digest), and the corresponding clauses of the Bombay and Madras Charters. For the same Courts in the exercise of their *Extraordinary Original Civil Jurisdiction*, see clause 20 of the Bengal Charter of 1865, and the corresponding clauses of the Bombay and Madras Charters, and clause 13 of the North-Western Provinces Charter. The High Courts in the exercise of their Civil Appellate Jurisdiction are to apply such law or equity and rule of good conscience as the Court in which the proceedings in the case were originally instituted ought to have applied, see clause 21 of the Bengal Charter of 1865 and the corresponding clauses of the Bombay and Madras Charters, and clause 14 of the North-Western Provinces Charter.

[4] See Section 24, Act VI of 1872 for the Provinces under the Lieutenant-Governors of Bengal and the North-Western Provinces; Section 6, Act IV of 1872 for the Panjáb; Section 17, Regulation II of 1802 for the Madras Presidency; Section 26, Regulation IV of 1827 for the Bombay Presidency; Section 31, Act XXXII of 1871 for Oudh; Section 6, Act VII of 1872 for Burmah; and the previous note for the High Courts in the exercise of their Civil Jurisdiction, Original and Appellate.

sidency towns, the Common and Statute Law which prevailed in England in the year 1726, and which has not since been altered by Statutes extending to India or by the Acts of the Legislative Council of India—the Statute Law expressly extending to India, enacted since 1726, and not subsequently repealed—and the Civil Law as it obtained in the Ecclesiastical and Admiralty Courts in England.

Distinction between Procedure and Evidence not accurately observed.

§ 4. Rules of *procedure*, rules of *pleading*, and rules of *evidence*, all fall under the head of Adjective Law; but no very accurate line of distinction has been observed as to what forms the appropriate province of each set of rules respectively. Most English treatises on the law of evidence deal with many topics which do not properly fall under this head, and which, according to a more scientific classification of the subject, would belong to the domain of procedure. To give an example, the Code of Civil Procedure enacts that—"The Civil Courts shall not take cognizance of any suit brought on a cause of action which shall have been heard and determined by a Court of competent jurisdiction in a former suit between the same parties, or between parties under whom they claim;" and the Code of Criminal Procedure (Sec. 460) enacts that a man shall not be tried again for an offence for which he has once been acquitted or convicted. The precise effect of these provisions in each of the various cases to which they have to be applied, involves many nice and intricate questions: but the whole matter is concerned not with 'evidence' but with 'procedure;' and such is the view that has rightly been taken by the authors of the Indian Codes.[1]

Misapprehensions as to the true use of Rules of Evidence.

§ 5. The real use and importance of rules of evidence have not always been clearly understood; and the value of such rules has been in consequence underrated by persons, who, by reason of this

[1] Mr. Stephen's Speech—*Proceeding of the Legislative Council, March* 30, 1872.

misunderstanding, have expected them to accomplish impossible results, and have as a matter of course been disappointed. The exaggerated pretensions of the authors of certain systems, who have aspired at the complete discovery of truth (and, as might have been expected, have failed), have also done much to create dislike and distrust of any rules whatever on the subject. Archbishop Whately has shown that most of the complaints made against Logic are due to similar causes: and it may be observed that each system in its turn has been expected to accomplish what properly falls within the province of the other. It has been objected against *Logic*, for example, that it leaves untouched the greatest difficulties, and those which are the sources of the chief errors in reasoning, *viz.*, the ambiguity or indistinctness of terms, and the doubts respecting the degrees of evidence in various propositions,—an objection which is not to be removed by any such attempt as that of Watts to lay down "rules for forming clear ideas," and "for guiding the judgment;" but by replying that no art is to be censured for not teaching more than falls within its province, and, indeed, more than can be taught by any conceivable art. Such a system of universal knowledge as should instruct us in the full meaning or meanings of every term, and the truth or falsity, certainty or uncertainty, of every proposition, thus superseding all other studies, it is most unphilosophical to expect or even to imagine. And to find fault with Logic for not performing this, is as if one should object to the science of optics for not giving sight to the blind; or as if one should complain of a reading-glass for being of no service to a person who had never learned to read. In fact, the difficulties and errors above alluded to are not in the process of reasoning itself (which alone is the appropriate province of Logic), but in the subject-matter about which it is employed.[1]

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[1] *Whately's Logic.* Introduction, § 5.

§ 6. Similarly, there are two problems, and those by far the most important of any which a Judge has to solve, upon which rules of evidence throw no light at all, and on which they are not intended to throw any light. No rule of evidence that ever was framed will assist a Judge in the very smallest degree in determining the master question of the whole subject—whether and how far he ought to believe what the witnesses say? Again, rules of evidence throw no light on a further question of equal importance which belongs to the domain, not of Evidence, but of Logic—what inference ought the Judge to draw from the facts in which, after considering the statements made to him, he believes? In every judicial proceeding whatever, these two essential questions—Is this true? and, if it is true, what then? ought to be constantly present to the mind of the Judge; but the rules of evidence do not throw the smallest portion of light upon either of them; and persons who are absolutely ignorant of those rules may occasionally give a much better answer to each of these questions than men to whom every rule of evidence is perfectly familiar. A more or less distinct perception of this, coupled with impatience of the exaggerated pretentions which have sometimes been made on behalf of the rules of evidence, are the principal reasons for the distrust and dislike with which they are at times regarded, and which are merely a particular application of the vulgar error which in so many instances leads people to deprecate art in comparison with nature: as if there were any opposition between the two, and as if true art did not presuppose and depend upon nature. The best shoes in the world will not make a man walk, nor will the best glasses make him see, if he be wholly lame or blind: so the best rules of evidence will not supply the place of natural sagacity or of a taste for and training in logic; but it no more follows that rules of evidence are useless as guides

Where Rules of Evidence will not assist.

to truth, than that shoes or glasses are useless as assistances to the feet and to the eyes.[1]

Objection against such Rules considered.

§ 7. The objection against rules of evidence, namely, that they are useless, inasmuch as it is possible without any such rules to try cases and adjudicate correctly, seeing that men in the ordinary concerns of life, without any such rules to guide them, act with safety upon the statements of others and discover with sufficient certainty those facts which ought to influence their conduct, may be compared to the popular objection made against Logic, that men may reason very well who know nothing of it. Now, in every instance in which we *reason*, a certain process takes place in the mind, which is one and the same in all cases. Many persons are not even conscious of this process in their own minds, much less competent to explain the principles on which it proceeds.[2] This indeed is, and cannot but be, the case with every other process respecting which any system has been formed; the practice not only *may* exist independently of the theory, but must have preceded the theory. There must have been language before a system of grammar could be devised; and musical compositions previous to the science of music. This shows the futility of the objections above referred to. The parallel instances adduced show that similar objections might be applied in many other cases, where their absurdity would be obvious; and there is no ground for deciding thence that system has no tendency to improve practice.[3] A rightly-formed system does not cramp the natural powers, but assists them.

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[1] Mr. Stephen's Speech—*Proceedings of the Legislative Council, April* 18, 1871.

[2] Just as of the many millions on the face of the globe capable of *walking*, but few can explain the exquisite machinery of the human frame which enables the biped by the exercise of the will to progress, to recede, to go sideways at any angle, and to turn round.

[3] See *Whately's Logic*, Book I., § 1.

§ 8. In addition to what has been just said, the real use and importance of rules of evidence will be further shown by the following considerations:[1] Those systems, which, like the French, dispense with all rules of evidence, obtain no other result from the want of them than floods of irrelevant gossip and collateral questions sufficient to confuse the strongest head and distract the most attentive mind. This will be readily intelligible to any one who has been present at the proceedings of an ordinary Court of Criminal Justice, where English rules of evidence prevail, and at the proceedings of a Court-Martial.[2] An ordinary Criminal Court never gets very far from the point, but a Court-Martial continually wanders into questions far remote from those which it was assembled to try.[3] The result of the introduction of collateral and irrelevant questions is to prolong and extend the proceedings of a Court of Justice to an inconvenient and useless extent. Now, the practical effect of rules of evidence, as shown by the operation of such rules in

Real use of Rules of Evidence.

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[1] "A youthful Achilles," says Archbishop Whately, "may acquire skill in hurling the javelin under the instruction of a Chiron, though the master may not be able to compete with the pupil in vigour of arm. * * * * It has been truly observed that 'genious begins where rules end.' But to infer from this, as some seem disposed to do, that in any department wherein genius can be displayed, rules must be useless, or useless to those who possess genius, is a very rash conclusion. What I have observed elsewhere concerning Logic, that "a knowlege of it serves to save a *waste* of ingenuity," holds good in many other departments also. In travelling through a country partially settled and explored, it is wise to make use of charts, and of high-roads with direction-posts, as far as these will serve our purpose, and to reserve the guidance of the compass or the stars for places where we have no other helps. In like manner we should avail ourselves of rules as far as we *can* receive assistance from them, knowing that there will always be sufficient scope for genius in points for which no rules can be given." . *Whately's Rhetoric*, p. vi. of Preface. These remarks apply with equal if not greater force to rules of evidence.

[2] The case of the monk Léotade, the affair of St. Cyr, and the case of François Lesnier given at the end of Mr. Stephen's "General View of the Criminal Law of England," afford at once instances and proof of this.

[3] Mr. Stephen's Speech—*Proceedings of the Legislative Council*, *April* 18, 1871. See also some excellent remarks on Courts-Martial in Warren's Law Studies, Vol. II., p. 1023. The new Indian Evidence Act applies to Courts-Martial. See s. 1.

English Courts of Justice, is to exclude collateral and irrelevant matters, and therefore to shorten the proceedings, while at the same time consolidating and strengthening them. All Judges cannot possibly be expected, having regard to the average of judicial ability, to know how to set limits to the enquiries in which they are engaged; yet if they do not, an incalculable waste of time and energy, and a great weakening of the authority of the Court, is sure to follow.[1]

These evils are wholly prevented, or to a great extent obviated, by proper rules of evidence. Such rules are also of pre-eminent importance for the purpose of protecting and guiding the Judge in the discharge of his duty.[2] This consideration is especially valuable when applied to India, where the great majority of judicial officers have had no previous professional training, and where in almost all Mofussil Courts no assistance is derivable from a trained Bar.

Their value as Tests of Truth.

§ 9. Rules of evidence are further of peculiar value to the Judge as furnishing him with solid tests of truth;[3] and this they do, not (as certain continental systems aspire to do) by constituting a scientific machinery by which truth as to facts and as to men's actions can be ascertained somewhat as physical truths can be ascertained by the processes in use among men of science;[4] but by supplying negative tests, warranted by long and varied experience, as to two great points,[5] namely—the relevancy

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[1] Mr. Stephen's Speech—*Proceedings of the Legislative Council, April* 18, 1871.

[2] *Ibid.*

[3] *Ibid.*

[4] Mr. Maine's Speech—*Proceedings of the Legislative Council, December* 12, 1868.

[5] Elsewhere in his speech Mr. Stephen says,—"A Law of Evidence properly constructed would be nothing less than an application of the practical experience acquired in Courts of law to the problem of enquiring into the truth as to controverted questions of fact." Those who would dispense with all rules of evidence would do well to remember that the experience of an individual is but a small drop in the sea of the added experiences of all the individuals who have followed any profession or pursuit from the beginning. As to whether rules of evidence

of facts to the question to be decided by the Court; and the sort of evidence by which particular facts ought to be proved. They may, in the broadest and most popular form, be stated thus:—"If you want to arrive at the truth as to any matter of fact of serious importance, observe the following maxims:—*First*, if your belief in the principal fact which you wish to ascertain is to be, after all, an inference from other facts, let those facts, at all events, be closely connected with the principal fact in some one of certain specific modes. *Secondly*, never believe in any fact whatever, whether it is the fact which you principally wish to determine, or whether it is a fact from which you propose to infer the existence of the principal fact, until you have before you the best evidence that is to be had: that is to say, if the fact is a thing done, have before you some one who saw it done with his own eyes; if it was a thing said, have before you some one who heard it said with his own ears; if it was a written paper, have the paper before you and read it for yourself."[1]

Proof of the utility of such rules drawn from India.

§ 10. The history of the administration of justice in India furnishes conclusive proof of the utility of rules of evidence and the necessity for some such rules in order to the success of a system, however well constituted otherwise. Unfettered by any rules or restraints, the Courts away from the Presidency towns

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could be abolished even by express enactment of the Legislature, Mr. Stephen forcibly remarked as follows:—"There is a sense in which it may be said with perfect truth that even Legislative power is unequal to the task of abolishing rules of evidence. No doubt, it is competent to the Legislature to provide that no rules of evidence shall have the force of law; but, unless they expressly forbid all Courts and Judges to act upon any rules at all, or to listen to any arguments as to the manner in which they shall exercise the discretion with which they are invested (propositions too absurd to state or to discuss), the Judges infallibly will hear, and will be guided by, arguments upon the subject, and these arguments will be drawn from the practice of English Courts. Moreover, the Courts of Appeal will exercise their own discretion in the matter, and thus, by degrees, the system would grow up again in the most cumbrous, chaotic, and inconvenient of all conceivable shapes."

[1] Mr. Stephen's speech—*Proceedings of the Legislative Council, April* 18, 1871.

have each been a law unto themselves. The reports of cases decided in appeal by the old Sádr Courts and by the present High Courts furnish ample proof of the evils and of the occasional injustice which have been the result; and the Lords of the Judicial Committee of the Privy Council have in several instances made complaints and observations upon the nature of the evidence sent home from India.[1]

History of the Law of Evidence in India.

§ 11. A brief history of the law of evidence in India previous to the passing of the new Evidence Act will form an appropriate introduction to the Act itself. Within the Presidency towns, in the Courts established by Royal Charter, the English rules of evidence have been always followed. So much of these rules as were contained in the Common and Statute Law which prevailed in England before 1726 were introduced by the Charter of that year. Others of them were contained in the Statutes passed subsequently and expressly extending to India; while others, again, have no greater authority than that of use and custom—"*cursus curiæ est lex curiæ.*" Part of these rules consisted of those restrictions on the admissibility of evidence, which Mr. Bentham attacked with such force at the commencement of the present century, and which have since been swept away under the enlightened auspices of Lord Denman,

Courts established by Royal Charter.

[1] See para. 14, Civil Circular Order No. 9 of the Calcutta High Court, dated 26th February, 1867; page 189, Vol. I of the Author's Edition of the "General Rules and Circular Orders;" and the case of *Banwari Lal* v. *Hetnarain Singh*, before the Privy Council on the 22nd February, 1858, in which Dr. Lushington remarked,—"It is unfortunately too much the habit of those Courts to receive documents without that just discrimination which would prevail, *were the rules of evidence known and established;* but their Lordships are of opinion that they cannot in these cases take upon themselves to determine what ought or ought not to have been received in the Courts in India. They may lament the great latitude with which documentary evidence is received, but it would be contrary to justice, in any particular case, to visit upon an individual penal consequences, *because the administration of justice was not more strictly conducted with reference to the admission of evidence.*"

Lord Brougham, and others. India was not behind hand in the introduction of the reforms thus carried out in England. Act XIX of 1837 abolished incompetency by reason of a conviction for a criminal offence; and Section 1, Act IX of 1840 extended to Her Majesty's Courts of Justice in India the provisions of the 3rd and 4th Will. IV., cap. 92, as to interested witnesses. In 1843 Lord Denman's Act (6 and 7 Vict., cap. 85) was passed, which enacted that no person offered as a witness should be excluded by reason of *incapacity from crime* or interest from giving evidence either in person or by deposition: and the following year Act VII of 1844 introduced similar provisions as applicable to Her Majesty's Courts in the Presidency towns. In 1846 the Statute 9 and 10 Vict., cap. 95, first declared *parties to the proceeding, their wives and all other persons* competent as witnesses in the County Courts; and in 1851 Lord Brougham's Act (14 and 15 Vict., cap. 99) was passed, which declared the parties and the persons in whose behalf any suit, action, or proceeding might be brought or defended, competent and compellable to give evidence in any Court of Justice or before any person having by law or by consent of parties, authority to hear, receive, and examine evidence. Similar provisions were enacted for Her Majesty's Courts in India by Act XV of 1852. The Evidence Amendment Act of 1853 (16 and 17 Vict., cap. 83, introduced by Lord Brougham) made the husbands and wives of parties to the record competent and compellable as witnsses: and the same reform was introduced into India by Act II of 1855.

Courts not established by Royal Charter.

§ 12. For the Courts outside of the Presidency towns and not established by Royal Charter, no complete set of rules of evidence were ever laid down or introduced by authority. There were, indeed, a few occasional directions, half as to procedure, half as to evidence, to be met with in the old Regulations; and some few rules embodying the most striking reforms, then recently introduced in England, were inserted in Act XIX of 1853, the operation

of which was, however, restricted to the Bengal Presidency. Two years afterwards Act II of 1855 was passed. This Act reproduced with some additions all the reforms advocated by Mr. Bentham, and carried out in England by Lords Denham and Brougham; but nearly all its provisions pre-supposed the existence of that body of law, upon which these reforms and amendments were engrafted; and yet it was authoritatively decided that the English law of evidence was not the law in the Mofussil.[1]

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[1] Full Bench decision of the Calcutta High Court.—*Queen* v. *Khyrúla and others*, VI. W. R. Crim. Rul. 21, per Peacock (C. J.):—

"It is clear that the English Criminal Law was not the Criminal Law of the Mofussil, and that *the English Law of Evidence was never extended by any Regulation of Government to criminal trials there.* * * * The Mahomedan Criminal Law, including the Mahomedan Law of Evidence, is no longer the law of the country. * * * A Code of Evidence has not yet been passed and we have no express rule laid down by the Legislature in any existing laws upon the subject now under consideration. By the abolition of the Mahomedan law, *the law of England was not established in its place.* * * * In the case of European British subjects, who are governed by the law of England, we must administer that law. But *in the Mofussil, where the law of England is not the law of the country, &c.*"

The state of the case is thus summarized by the Commissioners appointed to prepare a body of substantive law for India in their Report presented to Her Majesty:—

"India does not at present possess an uniform law upon this subject. *Within the Presidency towns the English law of evidence is in force*, modified by certain Acts of the Indian Legislature, of which Act II of 1855 is the most important. This Act contains many valuable provisions. It extends the range of judicial notice, and facilitates the proof of documents, of foreign systems of law, and of matters of public history. It removes *incompetency* to testify by reason of interest or relationship; renders *parties to suits* liable to be called as witnesses, and makes *husband and wife* competent witnesses for or against each other in Civil proceedings; renders dying declarations admissible, though the declarant may have entertained hopes of recovery; provides that witnesses may be cross-examined by the party who called them, and that they shall not be excused from answering questions because they may thereby criminate themselves. Declarations which were against the *pecuniary interest* of the persons who made them, and entries according to the usual course of business, both of which kinds of evidence the English law admits only in case of death, are under this Act admissible if the person who made the declaration or the entry has become incapable of giving evidence, or if his testimony cannot be procured. The Act also gives to *books regularly kept*, and to certain commercial documents, the character of corroborative though not of independent evidence, and makes entries in such books independent evidence of certain formal matters; it extends the class of persons whose declarations are admissible in case of pedigree, and provides in effect that mistakes committed in the rejection or reception of evidence shall not lead to a new trial or to the reversal of a decision unless a substantial failure

"§ 13. It was further agreed that the rules of evidence to be found in Hindu and Mahomedan law were not binding on Mofussil Courts.[1] The real state of the case would then seem to have been as follows:—All admitted that the Mahomedan law of evidence was not to be followed. The *whole* of the English law of evidence had never by any general enactment been rendered applicable to India, though some portions of it, in a modified shape or otherwise, had been expressly incorporated in the Statute Law of this country; Act II of 1855 being the largest entire specimen of this fragmentary legislation, while other fragments were to be found scattered through the Statue Book, more especially in the Codes of Civil and Criminal Procedure. Where the Statute Law was silent, it devolved upon the higher Courts to supply the deficiency with case-made law, from which, as is well known, nearly the whole of the English unwritten Code has been constructed. In laying down precedents and settling disputed points, these higher Courts carefully considered the different systems in force in different countries, the former usage in India (if any), the peculiar circumstances of the country, and their modifying effect on principles of general application; and where, with due regard to these considerations, they found themselves able to follow the English law of evidence, they were generally willing to take it as their *guide*. The whole of the Indian law of evidence

Real state of the case.

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of justice has been caused thereby. *The Act, however, bears reference in many places to the existing law, and it appears to have been designed, not as a complete body of rules, but as supplementary to and corrective of the English law, and also of the customary law of evidence prevailing in those parts of British India where the English law is not administered.* This customary law has not assumed any definite form; the Mahomedan law, since the enactment of the new Code of Criminal Procedure, has ceased to have any validity in the country Courts, even in criminal matters; and those Courts have in fact no fixed rules of evidence except those contained in Act II of 1855. *They are not required to follow the English law as such, although they are not debarred from following it where they regard it as the most equitable.*"

[1] See extract from the Full Bench decision in the last note; and Arbuthnot's Select Reports (Madras), Preface, p. 27.

might then be divided into *three* portions, *viz.*, one portion *settled* by the express enactments of the Legislature; a second portion *settled* by judicial decision; and a third or *unsettled* portion, and by far the largest of the three which remained to be incorporated with either of the preceding portions.

§ 14. When introducing the Draft Bill[1] drawn up by Her Majesty's Commissioners, Mr. Maine,[2] who was then the Legal Member of Council, after quoting the observations made by the Commissioners in their Report, proceeded to remark as follows:—

Unsatisfactory state of the Law.

"During the last ten or fifteen years the doctrine that the English law of evidence was *vi propriâ* in force throughout the whole of the country has certainly gained strength, and the habit of applying that law with increasing strictness is gaining ground. No doubt much evidence is received by the Mofussil Courts which the English Courts would not regard as strictly admissible. But I would appeal to Members of Council who have had more experience in the Mofussil than myself, whether the Judges of those Courts do not as a matter of fact believe that it is their duty to administer the English law of evidence as modified by the Evidence Acts. In particular, I am informed that when a case is argued by a barrister before a Mofussil Judge, and when the English rules of evidence are pressed on his attention, he does practically accept

[1] This Bill never got beyond the first reading. It was circulated for opinion to the Local Governments, and was pronounced by every legal authority to which it was submitted to be unsuitable to the wants of the country. The chief objection to it was that it was not sufficiently elementary for the officers for whose use it was designed, and that it assumed an acquaintance on their part with the law of England, which could scarcely be expected from them. Mr. Stephen spoke thus of it in Council:—"I may observe in general, however, that the principal reasons were that the Bill was not sufficiently elementary, that it was in several respects incomplete, and that, if it became law, it would not supersede the necessity under which judicial officers in this country are at present placed of acquainting themselves by means of English hand-books with the English law upon this subject. The Commissioners' draft, indeed, would hardly be intelligible to a person who did not enter upon the study of it with a considerable knowledge of the English law."

[2] Now Sir Henry Sumner Maine.

those rules, and admit or reject evidence according to his construction of them. I cannot help regarding this state of things as eminently unsatisfactory. I entirely agree with the Commissioners that there are parts of the English law of evidence which are not suited to this country. We have heard much of the laxity with which evidence is admitted in the Mofussil Courts, but the truth is that this laxity is to a considerable extent justifiable. The evil, it appears to me, lies less in admitting evidence which under strict rules of admissibility should be rejected, than in admitting and rejecting evidence without fixed rules to govern admission and rejection. Anything like a capricious administration of the law of evidence is an evil, but it would be an equal, or perhaps even a greater, evil that such strict rules of evidence should be enforced as practically to leave the Court without the materials for a decision. I would venture to state my impression that the fault of substance ordinarily committed by the Mofussil Courts consists less in lax admission of evidence than in averting their attention from the evidence really before them, and in conjecturing the facts of the case upon probabilities derived from a consideration of what the Natives of this country would be likely to do under given circumstances.[1] Another objection lies in the necessity which the Mofussil Judges are thus placed under of depending upon English text-books. There are excellent text-books of the English law of evidence, but their usefulness consists more in refreshing knowledge which has been gained by forensic experience than in teaching knowledge. The Commissioners would appear to be right in supposing that what was wanted for the greatest part of India is a liberalized version of the English Law of Evidence, enacted with authority, and thus excluding caprice, and superseding the use of text-books by compactness and precision."[2]

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[1] The author can add the testimony of his experience to the truth of the above remarks.

[2] *Proceedings of the Legislative Council of 12th December*, 1868.

English Law practically followed.

§ 15. More than two years after, Mr. Stephen (Mr. Maine's successor) when introducing the Bill, which has since become law, with not less truth expressed himself thus:—"It would be exceedingly difficult to say precisely what, at the present moment, the law upon the subject certainly is. To some extent—it is far from being clear to what extent—and in some parts of the country—though questions might be raised as to the particular parts of the country—the English law of evidence appears to be in force in British India. Whatever may be the theory, it both is and will continue to be so in practice; for if the English law of evidence has not been introduced into this country, English lawyers and quasi-layers have; and they have been directed to decide according to the law of justice, equity, and good conscience. Practically speaking, these attractive words mean little more than an imperfect understanding of imperfect collections of not very recent editions of English text-books. It is difficult to imagine anything much less satisfactory than such a state of the law as this. A good deal may be said for an elaborate legal system, well understood and strictly administered,—a good deal may be said for unaided mother-wit and natural shrewdness; but a half-and-half system, in which a vast body of half-understood law, totally destitute of arrangement, and of uncertain authority, maintains a dead-alive existence, is a state of things which it is by no means easy to praise."[1]

§ 16. It will readily be conceived that the necessity for legislation was admitted, when the unsatisfactory state of things above described came to be fully realized. It being then resolved to prepare a Code of Evidence for India, the first question that arose in carrying out this resolution was—"What system was to be taken as the model for this Code?" Her Majesty's Commissioners, when

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[1] *Proceedings of the Legislative Council of 18th April*, 1871.

presenting the Bill drawn up by them, made in their report the following remarks on this point:—

English Law of Evidence in its entirety not suited to India.

"In laying down uniform rules for the guidance of the Indian Judges in general, as well in the Courts just mentioned as in those in which the English law of evidence has hitherto prevailed, we do not think that it would be advisable to adopt a system so artificial as that which has grown up in this country. The English practice has been moulded in a great degree by our social and legal institutions and our forms of procedure; and much of it is admitted to be unsuited to the various states of society and the different forms of property which are to be met with in India. In England the aim has been to avoid presenting to the consideration of the jury whatever it was thought could not safely be presented to an unprofessional tribunal. In order to obtain this end, various kinds of evidence, which were deemed little worthy of credit, were pronounced inadmissible, and a great deal of evidence which, if duly weighed and dispassionately considered, would tend to the elucidation of truth is absolutely excluded. * * * * * In a country like India, where the task of judicial investigation is attended with peculiar difficulties, and where it is the duty of the Judge in all Civil and in some Criminal cases to decide without a jury, there is a greater danger of miscarriage from the mind of the Court being uninformed than from its being unduly influenced by the information laid before it. It seems, therefore, better to afford every facility for the admission of truth, although with some risk that falsehood or error may be mixed with it, than to narrow, with a view to the exclusion of falsehood, the channels by which truth is admitted."

The First Bill.

§ 17. Believing the English law of evidence taken as a whole to be a model of good sense, the Commissioners sought to avail themselves of the results of English experience, at the same time avoiding all that appeared to them unsuited to India,

and accommodating the rest to the peculiar requirements of the administration of justice in India as above described. The Draft Bill prepared by Her Majesty's Commissioners did not, however, meet with approval in India. The Select Committee of the Legislative Council of India, to whom it was referred for report, after a very careful consideration of the Draft, arrived at the conclusion that it was not suited to the wants of the country. The grounds on which this conclusion was based were, "in a few words, that it was not sufficiently elementary for the officers for whose use it was designed, and that it assumed an acqaintance on their part with the law of England, which could scarcely be expected from them."

The Second Bill.

§ 18. The Select Committee accordingly proceeded under the auspices and guidance of Mr. Stephen, to prepare a new Bill, as to which they thus speak in their report:—

Evidence Act based on English Law of Evidence modified to suit India.

"In general, it has been our object to reproduce the "English Law of Evidence with cer- "tain modifications, most of which "have been suggested by the Com- "missioners, though with some this "is not the case. The English Law of Evidence appears "to us to be totally destitute of arrangement. This arises "partly from the circumstance that its leading terms are "continually used in different senses, and partly from the "circumstance that the Law of Evidence was formed by "degrees out of various elements, and in particular out of "the English system of pleading and the habitual practice "of the Courts of Common Law.[1] For instance, the "rule that evidence must be confined to points in issue is "founded on the system of pleading. The rule that hearsay "is no evidence is part of the practice of the Courts; but

[1] Mr. Maine said that the English law of evidence would probably never have come into existence but for one peculiarity of the English judicial administration—the separation of the Judge of law from the Judge of fact, of the Judge from the Jury.—*Proceedings of the Legislative Council of 12th December*, 1868.

"the two sets of rules run into each other in such an "irregular way as to produce between them a result which "no one can possibly understand systematically, unless he "is both acquainted with the principles of a system of "pleading which is being rapidly abolished, and with the "every-day practice of the Common Law Courts, which "can be acquired and understood only by those who ha-"bitually take part in it. This knowledge, moreover, must "be qualified by a study of text-books, which are seldom "systematically arranged. Many other circumstances, to "which we need not refer, have contributed largely to "the general result; but we may illustrate the extreme "intricacy of the law, and the total absence of anything "like system which pervades every part of it, by a single "instance. In Mr. Pitt Taylor's work on Evidence, it is "stated that 'ancient documents, when tendered in sup-"port of ancient possession,' form the third exception to "the rule which excludes hearsay. The question is whe-"ther A is entitled to a fishery. He produces a Royal "grant of the fishery to his ancestor. This fact the law "describes as a peculiar kind of hearsay admissible by "special exception. Surely this is using language in a "most uninstructive manner. This being the case, we "have discarded altogether the phraseology in which the "English text-writers usually express themselves, and "have attempted first to ascertain, and then to arrange in "their natural order, the principles which underlie the "numerous cases and fragmentary rules which they have "collected together. The result is as follows:—

On what principles constructed.

§ 19. "Every judicial proceeding whatever has for its "purpose the ascertaining of some "right or liability. If the proceeding "is criminal, the object is to ascertain "the liability to punishment of the person accused; if the "proceeding is civil, the object is to ascertain some right "of property or of status, or the right of one party, and "the liability of the other, to some form of relief. All "rights and liabilities are dependent upon and arise out of

"facts, and facts fall into two classes, those which can, and "those which cannot, be perceived by the senses. Of "facts which can be perceived by the senses, it is surper-"fluous to give examples. Of facts which cannot be per-"ceived by the senses, intention, fraud, good faith, and "knowledge, may be given as examples. But each class "of facts has, in common, one element which entitles them "to the name of facts—they can be directly perceived "either with or without the intervention of the senses. "A man can testify to the fact that, at a certain time, he "had a certain intention, on the same ground as that on "which he can testify that, at a certain time and place, he "saw a particular man. He has, in each case, a present "recollection of a past direct perception. Moreover, it is "equally necessary to ascertain facts of each class in "judicial proceedings, and they must in most cases be "ascertained in precisely the same way.

Relation of Facts to Rights and Liabilities.

§ 20. "Facts may be related to rights and liabilities in "one of two different ways: (1) "They may by themselves, or in con-"nection with other facts constitute "such a state of things that the existence of the dis-"puted right or liability would be a legal inference from "them. From the fact that A is the eldest son of B, there "arises of necessity the inference that A is by the law of "England the heir-at-law of B, and that he has such "rights as that status involves. From the fact that A "caused the death of B under certain circumstances, and "with a certain intention or knowledge, there arises of "necessity the inference that A murdered B, and is liable "to the punishment provided by law for murder. Facts "thus related to a proceeding may be called facts in issue, "unless, indeed, their existence is undisputed. (2) Facts, "which are not themselves in issue in the sense above ex-"plained, may affect the probability of the existence of "facts in issue, and these may be called collateral facts. "It appears to us that these two classes comprise all the "facts with which it can in any event be necessary for

"Courts of Justice to concern themselves, so that this "classification exhausts all facts considered in their relation "to the proceeding in which they are to be proved.

Question of Proof considered.

§ 21. "This introduces the question of proof. It is "obvious that, whether an alleged "fact is a fact in issue or a collateral "fact, the Court can draw no inference from its existence till it believes it to exist; and it is "also obvious that the belief of the Court in the existence "of a given fact ought to proceed upon grounds altogether "independent of the relation of the fact to the object and "nature of the proceeding in which its existence is to be "determined. The question is, whether A wrote a letter. "The letter may have contained the terms of a contract; "it may have been a libel; it may have constituted the "motive for the commission of a crime by B; it may "supply proof of an *alibi* in favour of A; it may be an "admission or a confession of crime;—but whatever may "be the relation of the fact to the proceeding, the Court "cannot act upon it unless it believes that A did write the "letter, and that belief must obviously be produced, in "each of the cases mentioned, by the same or similar "means. If, for instance, the Court requires the production of the original when the writing of the letter is a "crime, there can be no reason why it should be satisfied "with a copy when the writing of the letter is a motive "for a crime. In short, the way in which a fact should "be proved depends on the nature of the fact, and not on "the relation of the fact to the proceeding.

Evidence—What.

§ 22. "The instrument by which the Court is convinced "of a fact is evidence. It is often "classified as being either direct or "circumstantial. We have not adopted this classification. "If the distinction is that direct evidence establishes a fact "in issue, whereas circumstantial evidence establishes a "collateral fact, evidence is classified, not with reference "to its essential qualities, but with reference to the use to "which it is put; as if paper were to be defined, not by

"reference to its component elements, but as being used "for writing or for printing. We have shown that the "mode in which a fact must be proved depends on its "nature, and not on the use to be made of it. Evidence, "therefore, should be defined, not with reference to the "nature of the fact which it is to prove, but with refer-"ence to its own nature.

Cause of ambiguity in the use of the word.

§ 23. "Sometimes the distinction is stated thus: Direct "evidence is a statement of what a "man has actually seen or heard. "Circumstantial evidence is some-"thing from which facts in issue are to be inferred. If the "phrase is thus used, the word *evidence*, in the two phrases "(direct *evidence* and circumstantial *evidence*) opposed to "each other, has two different meanings. In the first, it "means testimony; in the second, it means a fact which "is to serve as the foundation for an inference. It would, "indeed, be quite correct, if this view is taken, to say, 'Cir-"cumstantial evidence must be proved by direct evidence.' "This would be a most clumsy mode of expression, but "it shows the ambiguity of the word 'evidence,' which "means either[1]—(1) words spoken or things produced in "order to convince the Court of the existence of facts; or "(2) facts of which the Court is so convinced which sug-"gest some inference as to other facts. We use the word "'evidence' in the first of these senses only, and so used "it may be reduced to three heads—1, Oral Evidence; "2, Documentary Evidence; 3, Material Evidence. Fi-"nally, the evidence by which facts are to be proved must "be brought to the notice of the Court and submitted to "its judgment, and the Court must form its judgment "respecting them."

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[1] Mr. Stephen said, in his speech of the 18th April, 1871:—"The main feature of the Bill consists in the distinction drawn by it *between the relevancy of facts and the mode of proving relevant facts.* The neglect of this distinction by English text-writers no doubt arises from the ambiguity of the word "evidence," and is the main cause of the extreme difficulty of understanding the English law of evidence systematically.

§ 24. The following skeleton of the contents of the Act, as passed, will show how the subject has been distributed under the heads above indicated :—

Skeleton of the Act.

PART I.—RELEVANCY OF FACTS.

Chapter I.—Preliminary.
Chapter II.—Of the Relevancy of Facts.

PART II.—ON PROOF.

Chapter III.—Facts which need not be proved.
Chapter IV.—Of Oral Evidence.
Chapter V.—Of Documentary Evidence.
Chapter VI.—Of the exclusion of Oral by Documentary Evidence.

PART III.—PRODUCTION AND EFFECT OF EVIDENCE.

Chapter VII.—Of the Burden of Proof.
Chapter VIII.—Estoppel.
Chapter IX.—Of Witnesses.
Chapter X.—Of the Examination of Witnesses.
Chapter XI.—Of improper Admission and Rejection of Evidence.

§ 25. It has been seen how Her Majesty's Commissioners recognized the peculiar distinction between the functions of a Judge in England and the functions of a Judge in India. In the latter country a Judge is in all Civil cases, and in the majority of Criminal cases, judge both of fact and of law. The Select Committee did not lose sight of this very important distinction in preparing their Bill, as will appear from the following remarks of Mr. Stephen, which should be carefully remembered by those looking forward to judicial office in India :—

Distinction between functions of a Judge in India and in England.

"That part of the law of evidence which relates to the manner in which witnesses are to be examined assumes the existence of a well-educated Bar, co-operating with the Judge and relieving him practically of every other

duty than that of deciding questions which may arise between them. I need hardly say that this state of things does not exist in India, and that it would be a great mistake to legislate as if it did. In a great number of cases—probably the vast numerical majority—*the Judge has to conduct the whole trial himself.* In all cases he has to represent the interests of the public much more distinctly than he does in England. In many cases he has to get at the truth, or as near to it as he can, by the aid of collateral inquiries, which may incidentally tend to something relevant; and it is most unlikely that he should ever wish to push an inquiry needlessly, or to go into matters not really connected with it. We have accordingly thought it right to arm Judges with a general power to ask any questions, upon any facts, of any witnesses, at any stage of the proceedings, irrespectively of the rules of evidence binding on the parties and their agents, and we have inserted in the Bill a distinct declaration that it is the duty of the Judge, especially in criminal cases, not merely to listen to the evidence put before him, but to inquire to the utmost into the truth of the matter.[1] We do not think that the English theories, that the public have no interest in arriving at the truth, and that even criminal proceedings ought to be regarded mainly in the light of private questions between the prosecutor and the prisoner, are at all suited to India, if indeed they are the result of anything better than carelessness and apathy in England."[2]

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[1] The Bill was subsequently modified in this respect; but see section 165, *post.*

[2] The following Note taken from the first edition of this work is still important in connection with the above remarks:—The task of a Judge is much easier in an English than in an Indian Court of law. In England the parties or their counsel fix the issues, and the Judge directs the evidence thereupon. In India the Judge selects the issues, because there are no counsel competent to do so. This one duty, thrown of necessity on Indian Judges, renders *Mofussil experience a sine quâ non* for the Mofussil Bench. True judicial excellence is attainable for the Mofussil only by the proper legal training of those who have cast their lot there, so as to acquire this experience in subordinate posts.

The importance of the proper selection of the issues by the Judge will appear from a decision of the Calcutta High Court. *Jashoda Kanwar, Petitioner,* v. *Babú Gouri Beijnath Persád,* 10*th August,* 1866, I. Jurist, 365), in which it was held that

§ 26. Having given a sketch of the history of the Law of Evidence in India, and some description of the principles which have been followed in framing the Act, by

Object of the remaining portion of this Introduction.

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the client is not bound by the mistaken consent of his pleader to abide by issues of law erroneously framed by the Judge. The following extract from this decision is important:—

"But, then, it is said that the appellant's pleader having given his consent to "these issues, she is bound by his act, and may not contend that those issues were "erroneous. This argument, however, in my opinion, assumes for pleaders in the "Mofussil Courts of this country an authority which they do not possess, and with "which it would not be safe to invest them, and which, moreover, as we shall show, is not contemplated by the law of procedure in India.

"In England, no doubt, the law is that parties are bound not merely by "admissions but by the view taken of their cases, and the mode of conducting "them by their counsel at the trial.

"By Section 38, Act XXVII of 1861, the procedure prescribed by Act VIII "of 1859 is to be followed, as far as it can be, in all miscellaneous cases, and "proceedings which, after the passing of the Act, may be instituted in any Court.

"The mode in which issues are to be framed under that Act is to be found in "Sections 139 to 141, which clearly show that this is exclusively the function "of the Court. Section 139 declares that the Court may frame the issues from "the allegations of fact which it collects from the oral examination of the parties "or their pleaders, notwithstanding any difference, &c. *This clearly shows that "the pleader may bind his client by a statement of matters of fact, but nothing is said "of issues or admissions of law.*

"The only cases in which the issues are not directly framed by the Court are "those provided for by Sections 142 and 143. In those cases, issues may be "tendered to the Court under a solemn agreement between *the parties* in writing, "by which they bind themselves to act according to the finding of the Court upon "such issues, and the Court, if it be satisfied that the *parties* have so agreed, and "that the question is *fit to be tried* (still retaining a control over the frame of the "issue), may proceed to determine the same. There was no agreement of the sort "here, and the responsibility of the issues lay wholly on the Court.

"In the Mofussil Courts, no doubt, particular acts done within the conditions "of the *vakálutnama* and admissions of fact by the "pleader, are binding on the client,* but we cannot "hold that the client is bound, by the mistaken con-"sent of his pleader, to abide by issues of law erro-"neously framed by the Judge, and not properly arising in the case.

* See cases cited in Macpherson's Civil Procedure, 4th Edition, page 209, Notes A. and C.

"There is but a slight analogy between a barrister in English Courts of Justice "and a Mofussil pleader.

"The former is usually entrusted with the conduct of a case (through an "attorney) by reason of his learning and ability: he is responsible to the Court "and to the profession of which he is a member for his professional conduct, and "he has well-known privileges and immunities.

"The *vakil* is simply the representative of the suitor possessed of his personal "confidence, and in direct communication with him, but having neither in theory "nor in fact the learning and the varied experience of the English barrister.

which the Courts in India are henceforth to be guided in dealing with evidence, I leave the details of the measure to be gathered from the study of the Act itself, and of those notes by which I have endeavoured to elucidate its sections so as to render them at once intelligible to those who have

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"The pleader is presumably well acquainted with the facts of the case in which "he is employed, and he is bound to an honest care for his client's interest; but, "although of late years efforts have been made to ensure his having a rudimentary "knowledge of the law, it is certain that those efforts have been only partially "successful, and especially that no rule of practice can be laid down which is "based on the presumed legal science of the Mofussil practitioner.

"I say Mofussil practitioner, because these observations are not meant to apply "to the native bar in the Appellate High Court, nor do I deny that there are "honourable exceptions even in the interior; but any one who is at all acquainted "with the Mofussil Courts is aware that, generally speaking, the possession of "the commonest text-books by pleaders there is quite exceptional; it might be "possible to find some who are not even possessed of Act VIII itself.

"And very mainly, no doubt for this reason, the Legislature has in the Code "of Civil Procedure *imposed upon the Courts themselves the responsibility of con-* "*ducting suits in every stage.* Emphatically so as to the framing of issues, which, "under the present as well as the former procedure, is exclusively the business "of Courts."

A party is bound by an admission of a *fact* made by his vakíl. See *Khajah Abdúl Gunni* v. *Gour Mani Debya*, IX. W. R. 375; *Kower Narain Rai* v. *Srinath Mitter and others*, IX. W. R. 485; *Kali Kanund Bhattacharjya* v. *Girinbala Debya and others*, X. W. R. 322; *Matadi Rai* v. *Madhu Súdhun Singh and others*, X. W. R. 293. A vakíl employed to conduct a case has no implied authority to compromise it. There must be an express clause in his *vakálatnama* giving him authority to compromise, otherwise a compromise made by him will not be binding upon his client. *Prem Súkh* v. *Pirthi Ram and others*, II. N.-W. P. Rep. 222. In the case of *Ram Kúmar Rai and others, Appellants*, v. *the Collector of Birbhúm and others, Respondents* (V. W. R., Civ. Rul., 81) it was *held* that a *vakálatnáma*, which was broad and general in its terms and empowered the pleader to act and take any steps in the case, was *primâ facie* a sufficient authority for an application by the pleader to withdraw from the suit (under s. 97, Act VIII of 1859) with leave to sue again on the same cause of action, and that the client was bound by the order passed on this application; no application having been made to the Lower Court to set aside the order complained of, and there being nothing to show that the pleader had acted contrary to his instructions—there being also no allegation of fraud or misconduct on his part. Where a pleader, authorized to conduct the defence in the usual manner, pledged his client to relinquish his defence, if the plaintiff would assert on oath that the defendants were not the owners of the property in dispute, it was *held* that he had exceeded his powers and that his clients were not bound by his acts. *Mussamat Hakúnunissa* v. *Baldeo and others*, V. N.-W. P. Rep., 309. So also, where a case having been remanded by the High Court, a pleader gave up a part of the claim, having received no instructions to abandon such part. *Sheikh Abdúl Sabhan Chowdhry* v. *Sib Krishto Deo*, III. B. L. R. Appen. 15.

had no previous knowlege of the subject. As this work is intended more especially for beginners,—for those who, without much previous training and without having practised as advocates, will be required to exercise judicial functions at an early age, when they must naturally be deficient in experience, one of the most valuable qualities in a judicial functionary—as well experience in a general sense as also experience of a new country, a new people, a new language, and social and domestic habits quite different from those of the West,—I shall devote the remaining portion of this INTRODUCTION to some observations intended to assist in testing the value of evidence in India. I am well satisfied that no positive rules can be laid down for guidance in this direction. The best aids are natural sagacity and experience; but these may be quickened and assisted by hints drawn from the sagacity and experience of others.[1] Much of what follows has been collated from eminent writers who have discussed these questions from different points of view. For those remarks, which are more especially concerned with India, the Author alone is responsible.

Tests of Evidence.

§ 27. "I suppose," said Archbishop Whately, "it will not be denied that the three following are among the most important points to be ascertained in deciding on the credibility of witnesses: *first*, whether they have the means of gaining correct information; *secondly*, whether they have any interest in concealing truth; and, *thirdly*, whether they agree in their testimony."[2] The two first of these tests are applicable to the witnesses individually: the third to the whole

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[1] "In *no* department can systems of art equalize men of different degrees of original ability and experience, or teach us to accomplish all that is aimed at. No system of agriculture can create land; nor can the Art Military teach us to produce, like Cadmus, armed soldiers out of the earth: though land and soldiers are as essential to the practice of these arts, as the well-known preliminary admonition in the Cookery Book, 'first take your carp,' is to the culinary art. Nor can all the books that ever were written bring to a level with a man of military genius and experience a person of ordinary ability who has never seen service."—*Whately's Rhetoric. Introduction*, § 4.

[2] *Historic Doubts relative to Napoleon Buonaparte*, p. 14, sixth edition.

of the testimony taken together, to which a further and scarcely less important test also applies, namely, "is the evidence consistent with the usual and known principles of human action and with the common experience of mankind? I shall first consider the consistency of the evidence with itself.

Is the evidence consistent with itself?

§ 28. "The usual character of human testimony," says Dr. Paley, "is *substantial truth under circumstantial variety*. This is what the daily experience of Courts of Justice teaches. When accounts of a transaction come from the mouths of different witnesses, it is seldom that it is not possible to pick out apparent or real inconsistencies between them. These inconsistencies are studiously displayed by an adverse pleader, but oftentimes with little impression upon the minds of the Judge. On the contrary, a close and minute agreement induces the suspicion of confederacy and fraud." If the reader has ever been present at some startling accident or other abnormal occurrence, and has afterwards talked over the incidents of the occasion with others who were also present, he will readily realize the truth of these remarks for himself. He has, no doubt, found that he observed some things which did not strike the attention of some of his fellow-observers, and that some of them have seen matters which escaped his observation. The angle of view at which each observer stood, the objects that more or less intervened, the number of surrounding and distracting circumstances, and the difference between the powers of observation and keenness of sight of different individuals, together with other causes will readily account for this *circumstantial variety*, while all are agreed about the broad incidents of the *substantial truth*. If such circumstantial variety is possible, where the attention has been roused and stimulated by an occurrence unusual and out of the ordinary routine of daily life, how much more must it be possible when there is nothing to rouse and stimulate the mind to more than

ordinary attention! We find accordingly in the experience of every-day life, that men whom we know to be most truthful and honest derive the most opposite impressions from the same sources of ideas. The reader can easily instruct himself by following out this train of thought, and can test these remarks by applying them to the ordinary incidents of his own life. Experience will thus convince him that some variety in details is often one of the strongest marks of truth, while a close and minute agreement is indicative of conspiracy and fraud.

Agreement of Undesigned Coincidences.

§ 29. But, on the other hand, there is a certain kind of agreement in minor details, which has been justly held to be one of the most powerful indications of truth, *viz.*, that of *undesigned coincidences:* "Where several witnesses," says Mr. Starkie, "bear testimony to the same transaction, and concur in their statement of a series of particular circumstances, and the order in which they occurred, such coincidences exclude all apprehension of mere chance and accident, and can be accounted for only by one or other of two suppositions—either the testimony is true, or the coincidences are the result of concert and conspiracy." To determine which is actually the case, there are two valuable tests: *First,* are the witnesses independent, and acting without concert? *Second,* are the coincidences natural and undesigned? If it clearly appear that the witnesses are independent and acting without concert, and if the coincidences in their testimony be too numerous to be the result of mere accident, there will be created a presumption in favour of truth, which will exist independently of the credit of the witnesses themselves for honesty and veracity. "It is manifest," says Archbishop Whately, "that the concurrent testimony, positive or negative, of several witnesses, when there can have been no concert, and especially when there is any rivalry or hostility between them, carries with it a weight independent of that which may belong to each of them considered

separately. For though, in such a case, each of the witnesses should be even considered as wholly undeserving of credit, still the chances might be incalculable against their all agreeing in the *same* falsehood."[1] "It deserves likewise to be attended to on this subject," says Dr. Campbell, "that in a number of concurrent testimonies (in cases wherein there could have been no previous concert), there is a probability distinct from that which may be termed the sum of the probabilities resulting from the testimonies of the witnesses—a probability which would remain even though the witnesses were of such a character as to merit no faith at all. This probability arises purely from the concurrence itself. That such a concurrence should spring from chance is as one to infinite; that is, in other words, morally impossible. If, therefore, concert be excluded, there remains no other cause but the reality of the fact."[2]

Traits of witnesses in India.

§ 30. In India,[3] even in the most true cases, there is generally more or less concert between the witnesses on the same side. Coming probably from the same village, and personally known to each other, they travel together on foot to the Court, which is often more than one day's journey from their homes. Certain to beguile the tediousness of the way with conversation on the object of their journey, each tells all he knows for the benefit of the others. Arrived at the town or village where the Court is situate, they commonly lodge together, and together sit under the big trees[4] which surround the Court-house, waiting, it may be one day or several days, to have their testimony recorded, and still discoursing of what they have got to say and how to say it. Then the low

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[1] *Whately's Rhetoric*, Part I., Chap. II, § 4.

[2] *Campbell's Philosophy of Rhetoric*, Chap. V, Book I, Part III, p. 125.

[3] These remarks apply more especially to the Mofussil and to the Bengal Presidency, in which the Author's experience has lain.

[4] Most *Katcherries* or Court-houses in India are surrounded with trees for purposes of shade.

khtárs,[1] the unlicensed practitioners and case-mongers, who infest every Court in India, are sure to warn the parties at whose instance the witnesses are about to be examined of the danger of letting them go before the *hákim*[2] unprepared. As a natural result, the task of preparation is entrusted to these *disinterested* advisers, and the witnesses are prepared by being drilled in the whole story, as gathered from the several accounts given by each, the *mukhtár* making such additions and improvements as to him seem advisable, in order to render the whole evidence conformable to what in *his* opinion it should be; and impressing upon the witnesses the danger to the case if they should differ from each other in the smallest particular. It will not be surprising that, under the circumstances just described, the witnesses on the same side commonly know the *whole* story with every detail and incident thereof, and tell that story in the same language and with the same sequence of particulars:[3] and that the *circumstantial variety*, which is so strong an indication of truth, is nowhere apparent. In England fraudulent concert and untruthfulness might safely be assumed; but such an assumption would be far from being a safe one in the majority of instances in India.

Mode of dealing with Indian witnesses.

§ 31. The Indian Judge or Magistrate, who would arrive at the truth, ought, instead of allowing the witnesses to tell their voluble tale in the language which has been put into their mouths, to take them in hand himself or have them taken in hand by a competent pleader (if

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[1] *Mukhtár*, literally 'chosen,' 'selected,' 'invested with power,' is a native agent or attorney.

[2] "Judge," "Magistrate."

[3] In a case which came before the Author when a Magistrate, *five* witnesses, describing an assault said to have been committed by *eleven* persons, each and all of them detailed the names of the eleven accused *in the same order*. It may safely be said that without concert this could not possibly happen. The *mukhtár* had obtained a copy of the *complaint* made some days previously against the accused by name, with a view to obtain a summons: and, in order to guard effectually against discrepancy, he had made each of the five witnesses *commit it to memory*.

there is one engaged in the case), and by a series of care
questions elicit from them what they really know of th
own knowledge.[1] If attention be paid to the rema
which follow hereafter, a little patience and care
generally enable the Judge or Magistrate to disco
whether the story has been wholly invented or merely s
jected to the process of preparation above described.[2]

Are the coincidences Natural and Undesigned.

§ 32. I now proceed to the second test for determini whether coincidences are the ma of truth or the result of concert a conspiracy: and here I cannot

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[1] "The task of interrogation," says Mr. Norton, "requires much experi nce. The practice in Company's Courts, I believe, is to allow the witness in the first instance to tell his own story and then for the Court and parties to found any questions they please upon his statement. *I prefer the plan of compelling a witness to answer questions in the first instance.* When the story is made up, it is evident that the witness has a much easier task in simply giving an uninterr pted narrative, than in delivering himself of it in such order as his interrogator may choose. Time, too, is saved if the witness be compelled to answer succinctly the questions put to him, and he be not allowed to ramble into immaterial or impertinent statements." § 812. The Author has often found it convenient to let the *first* witness tell the story as prepared: and, where *second* and successive witnesses are evidently running off in the same groove, to take them in hand and interrogate.

In the case of *Ramgatì* v. *Srìmatì Imitari Banú* (I. B. L. R., Short Notes xx), *Peacock*, C. J., said—"It was remarked by the Lords of the Judicial Committee of the Privy Council in a recent case, *Sarendra Nath Rai* v. *Hiramani Barmani*" (I. B. L. R. P. C. 33)—'It is the great misfortune of Hindu litigants that their 'cases often fall in the earlier stages of litigation into the hands of incompetent 'advisers, who, by the mixture of falsehood with truth, or by the suppression or 'abandonment of part of a true case, from some mistaken views of policy or difficulty, create often impediments to its success from which the true story, if 'revealed, would have been free;' and I may add that it is another great misfortune of litigants in the Mofussil in this country, that the witnesses, who are called to prove the facts of the case, are not properly examined through the incompetency of those who have the management of the suits, and that the Judges do not make up for that incompetency by *themselves examining the witnesses* or exercising those powers for obtaining the truth with which they have been entrusted by the law of procedure. If the Munsiff failed in the performance of his duty in that respect, the Principal Sádr Amín had the power under S. 355 of the Code of Civil Procedure to require further evidence."

[2] In the case of serious offences triable by Magistrates and which the Police are authorized to investigate, the *duty* of preparation is occasionally performed by the Police, especially if they be of the old school. In the case of the more serious offences triable by the Court of Session, the witnesses have usually been examined by the Police and by the Magistrate before they appear at Sessions, where their testimony is therefore likely to be unusually perfect.

better than quote Mr. Starkie, who writes thus: "The nature of such coincidences is most important. Are they natural ones, which bear not the marks of artifice and premeditation? Do they occur in points obviously material, or in minute or remote points,[1] which were not "likely to be material, or in matters the importance of "which could not have been foreseen? The number of "such coincidences is also worthy of the most attentive "consideration. Human cunning to a certain extent "may fabricate coincidences, even with regard to minute "points, the more effectually to deceive, but the coin-"cidences of art and invention are necessarily circumscribed "and limited, whilst those of truth are indefinite and unlimited. The witnesses of art will be copious in their detail of circumstances, as far as their provision extends; beyond this they will be sparing and reserved for fear of detection, and thus their testimony will not be even and consistent: but the witnesses of truth will be equally ready and equally copious upon all points." "It must always be borne in mind," says Mr. Taylor, "that in the actual occurrences of human life nothing is inconsistent. Every event which actually transpires has its appropriate relation and place in the vast complication of circumstances of which the affairs of men consist; it owes its origin to those which have preceded it; it is intimately connected with all others which occur at the same time and place, and often with those of remote regions; and, in its turn, it gives birth to a thousand others which succeed. In all this perfect harmony prevails, so that a man can hardly invent a story, which, if closely compared with all the actual contemporaneous occurrences, may not be shown to be false." It is in fact as difficult to make a lie fit in with all the surrounding circumstances to which it must be adapted, as it is to fill up a hole made in the middle of a web of cloth so that no

[1] *Undesigned* testimony is manifestly so far the stronger, the suspicion of fabrication being thus precluded. Slight incidental hints, therefore, and oblique allusions to any fact have often much more weight than distinct formal assertions of it.—*Whately's Rhetoric.* Part I., Chap. II., § 4.

traces of the joining may be visible. It is impossible to take the threads of the warp and the woof and weave the rent or aperture over. It must needs be darned or patched, and the cleverest darning or the most skilful patchwork will show.

Agreement of doubtful portions of the evidence with those portions which are undoubted.

§ 33. In considering the consistency of the evidence with itself, it will also be well to see how far those portions of it which are doubtful coincide with facts which are either undisputed or have been proved beyond doubt. The following remarks of Baron Parke in the case of *Mír Asadúlah* alias *Shah Chaman* v. *Bibi Imaman, widow of Shah Khadim Hosein*, in appeal before the Privy Council (V. W. R. Privy Council Decisions, p. 26—29), should be constantly present to the mind of every Judicial officer in India: "There is no better criterion of the truth, no safer rule for investigating cases of conflicting evidence, where perjury and fraud must exist on the one side or the other, than to consider *what facts are beyond dispute*, and to examine which of the two cases best accords with those facts, according to the ordinary course of human affairs and the usual habits of life."

Danger of hasty conclusions.

§ 34. It is further of importance to consider how far the evidence is consistent with the general conduct of the actors throughout the whole affair, and with the general probabilities of the entire case. It is an error (and one to which young Judicial officers especially are liable) to fix the attention almost exclusively on some striking portion of the evidence and allow the mind to be borne away to an impulsive conclusion, which a due regard to the other portions of the evidence ought considerably to modify, if not wholly alter. It will also be well to bear in mind the self-evident but often forgotten maxim that *Disbelief is Belief*—only they have reference to opposite conclusions; *e. g.*, to disbelieve the existence of a fact is to believe that it was feigned. "The proper opposite to *Belief* is either conscious *Ignorance*

"or *Doubt*, and even Doubt may sometimes amount "to a kind of Belief; since deliberate and confirmed "doubt, on a question that one has attended to, implies "a verdict of *not proven*,—a belief that there is not "sufficient evidence to determine either one way or the "other. Many persons are of such a disposition as to be "nearly incapable of remaining in doubt on any point on "which they have once bestowed their attention. They "speedily make up their minds and come to *some* conclu-"sion, whether there are any grounds for it or not. "Others, again, there are, who are capable of remaining "in doubt as long as the reasons on each side seem exactly "balanced; but not otherwise. Such a person, as soon as "he perceives any—the smallest—preponderance of proba-"bility on one side of a question, can no more refrain "from deciding immediately, and with full conviction on "that side, than he could continue to stand, after having "lost his equilibrium, in a slanting position, like the "famous tower at Pisa. And he will accordingly be dis-"posed to consider an ackowledgment that there are some-"what the stronger reasons on one side, as equivalent to a "confident decision. The tendency to such an error is "the greater, from the circumstance that there are so "many cases, in practice, wherein it is essentially neces-"sary to come to a *practical* decision even where there are "no sufficient grounds for feeling *fully convinced* that it is "the right one.[1] A traveller may be in doubt and "have no means of deciding with just confidence which of "two roads he ought to take; while yet he must, at a ven-"ture, take one of them. And the like happens in num-"berless transactions of ordinary life, in which we are "obliged practically to make up our minds at once to take "one course or another, even where there are no sufficient

[1] There is a difference between *Civil* and *Criminal* cases. In Civil cases a preponderance of evidence justifies a decision in favour of one party—more especially where the right is doubtful or there is no *primâ facie* right on either side. In Criminal cases the evidence ought to be conclusive in order to conviction; and when there is a doubt, the accused should have the benefit of it.

"grounds for a full conviction of the understanding. "The infirmities above mentioned are those of *ordinary* "minds. A smaller number of persons, among whom "however, are to be found a larger proportion of the intel- "ligent, are prone to the opposite extreme—that of not "deciding, as long as there are reasons to be found on both "sides, even though there may be a "clear and strong preponderance on "the one, and even though the case "may be such as to call for a practical decision. *As the "one description of men rush hastily to a conclusion, and "trouble themselves little about premises, so the other care- "fully examine premises, and care too little for conclusions. "The one decide without inquiring; the other inquire with- "out deciding.*" These remarks of Archbishop Whately,[1] though not directed altogether to the subject of judicial evidence, illustrate very forcibly the errors to which judicial functionaries are liable, more especially when (as is so often of necessity the case in India) they come with little training and experience[2] to the discharge of duties, for the efficient performance of which training and experience are so essential. A clear perception of the errors themselves and in what they consist will give light and assistance to those who would endeavour to avoid them.

Opposite error of being unable to make up the mind to any conclusion.

§ 35. Another most important test of evidence is whether or not it is consistent with the common experience of mankind, with the usual course of nature and of human conduct, and with the well-known principles of human action. "As one principal ground of faith in human testimony is experience, it necessarily follows," says Mr. Starkie, "that such testimony is strengthened or weakened by its conformity or inconsistency with our previous knowledge and experience. A man easily credits a

Is the evidence consistent with the common Experience of mankind?

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[1] *Elements of Rhetoric, Part I, Chapter II*, § 5.

[2] It must not be forgotten that the author writes more especially with reference to the *Mofussil*.

witness, who states that to have happened which he himself has known to happen under similar circumstances; he may still believe, although he should not have had actual experience of similar facts; but where, as in the familiar instance[1] stated by Mr. Locke, that is asserted, which is not only unsupported by common experience, but contrary to it, belief is slow and difficult."[2] The test of which I now speak will be most safely applied by the Judge, who has himself had the greatest experience; but, as the widest individual knowledge and observation cannot possibly extend over the whole field of human experience, and as time develops many novelties, the possibility of the existence of which once appeared incredible,[3] it will be necessary to avoid the Scylla of indiscriminate scepticism on the one hand, while endeavouring to steer clear of the Charybdis of unbounded credulity on the other. The story of the Dutch Ambassador and the king of Siam will be well borne in mind by Englishmen, who have been appointed to judicial office in India. They will find much that is either new to them or contrary to their own preconceived ideas; and will at first have need to be cautious and careful to a degree, while even long after they have passed their novitiate, they will do well to remember the remarks of the Roman poet—"No man was ever endowed with a judgment so correct and judicious, but that circumstances, time, and experience would teach him something new, and apprise him that of those things with which he thought himself the best

[1] The Dutch Ambassador told the king of Siam that the rivers of Holland were occasionally frozen so hard that an elephant might walk over on the ice. "Hitherto," said the king, who had had no experience of such a phenomenon, "I have believed the strange things you have told me, but now I am sure you lie." Book IV, Chapter XV, S. V.

[2] Page 832.

[3] As steam communication by land and sea, and the wonders of the telegraph would have appeared to our ancestors. It is related that the value of the evidence given by George Stephenson before a Parliamentary Committee was greatly lessened by the fact of his having stated that *steam-carriages might possibly travel on rail-roads twelve miles an hour*. It would have been wholly destroyed had he said *sixty miles an hour*: and yet the latter now happens every day.

acquainted, he knew nothing; and that those ideas, which in theory appeared the most advantageous, were found, when brought into practice, to be altogether inapplicable."[1]

Value of testimony of Indian Witnesses.

§ 36. I now pass to some remarks concerned more especially with *witnesses*, and the value to be attached to their testimony under general and special circumstances. There would appear to be an opinion pretty generally prevalent,[2] that witnesses in India are more mendacious than witnesses in other countries; and it has been repeatedly stated that Judges in India have a far more difficult task to perform than Judges in England in consequence of the untruthful nature of the evidence with which they have to deal. Some persons have even gone so far as to say that while the presumption in England is that witnesses tell the truth, the presumption in India ought to be that they lie. In the case of *Rungama* v. *Atchama*, before the Privy Council, on the 29th February 1848,[3] their Lordships observed as follows:—"These instruments are produced and the facts tending to this conclusion are sworn to by a vast number of witnesses. There appears to us to be no objection to this testimony beyond the observation which may be made on all Hindú testimony, that perjury and forgery are so extensively prevalent in India that little reliance can be placed on it." It would be possible to quote from other judgments, as well of the Privy Council as of the highest Courts in India, passages in which the great

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[1] Terence.

[2] "Thus it has been justly observed, that a propensity to lying has been "always more or less a peculiar feature in the character of an enslaved people— "accustomed to oppression of every kind, and to be called upon to render "strict account for every trifle done, not according to the rules of justice, but "as the caprice of their masters may suggest. It is little to be wondered at if "a lie is often resorted to as a supposed refuge from punishment, and that thus "an habitual disregard is engendered." This passage is cited as accounting in some measure for the lamentable neglect of truth, which is evinced by most of the nations of India, by the subjects of the Czar, and by many of the peasantry of Ireland. Taylor, Vol. I, p. 69. § 45.

[3] 1 Moore's Indian Appeals, p 1.

prevalence of perjury and forgery is admitted and lamented; but it is not within either the Author's wish or the scope of his present subject to exaggerate the reproach of this particular immorality by multiplying proofs[1] of its existence. At the same time, to make no allusion whatever to the evil would be inconsistent with the design of the present remarks, which are intended more especially to guide those who require guidance. It will then be sufficient to say that while on the one hand it would be a gross slander to predicate of all the natives of India, as of the Cretans, that they are liars,[2] it would, on the other hand, be misleading the young judicial functionary to tell him that he may safely look for as much truth in an Indian as in an English witness-box.

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[1] See §§ 46, 47 and 55, *post*.

[2] The subject has recently been debated both in the Chamber of the Legislative Council and in the newspapers as connected with the new "Oath's Act." The present Lieutenant-Governor of Bengal (Mr. George Campbell) is reported to have thus expressed himself in Council:—"Dealing as they were with a peculiar people, with whom the speaking of truth was not in any way the custom, he felt that the means which were available for getting at the truth were defective. He would go back and say one or two words in respect to the expressions which had fallen from his hon'ble friend, Mr. ——, because he wished to put himself right with the Council and with the natives of the country in a very important matter. Mr. —— said that His Honor's belief was that the natives were above all men liars. His Honor wished most distinctly and completely to deny that that was his opinion. Although he had taken a logical view of the matter in saying that truth was not estimated by the majority of the natives as a virtue, he was not one of those who held exaggerated ideas in regard to the untruthfulness of the natives. He believed he was one of those who held the best opinion of the natives. He believed that they had many virtues, and that many of them spoke the truth in an honourable way; but he did not think that truth was considered by them as an honourable virtue to the same extent that it was so considered by Englishmen. He had not heard, in the various discussions that had taken place on the subject that any one had contradicted him on that point. His argument rather was, not that the natives were above all men liars, but rather that lying was natural to mankind, and that truth was a peculiar virtue which was only developed in certain civilized countries. He thought that the natives were on the same platform and parallel with most of the world in regard to the speaking of truth. He thought he was not doing any injustice to the people amongst whom he had spent his life in saying that truth, as truth, was not regarded as a virtue amongst them to the extent that it was regarded amongst some of the people of Western Europe."—*Proceedings of the Legislative Council*, 13*th April*, 1872.

§ 37. During the last half century education has been gradually bringing forth fruit; and one of its best fruits has been an increasing regard for truth among those classes who have had the benefits of education. But no fruit has been produced where no seed has been sown, and the great mass of the population, including more especially the lower classes, do not make a habit of speaking the truth, or regard falsehood with feelings of shame or abhorrence. Respectable natives do not, as readily and willingly as Englishmen, attend a Court of Justice to give evidence. Even in their own cases, where they have personal knowledge of the facts, they prefer calling or sending their servants or dependents to depose to them; and such persons are often more zealous for the success of a cause, the conduct of which is to a certain extent in their hands, than for truth. Again, the feeling of revenge, which is so strong in the breast of the Oriental[1] is perpetually suggesting new ways of achieving that vengeance which is almost as dear as life;[2] and, in these days of law and order, a false case, by which a man may be deprived of his paternal lands or sold out of house and home or even consigned to the walls of the criminal jail, is a common device with the native for obtaining his desire upon his enemy. Then, in India, every man has his own caste, separate profession and occupation; and as *thugs* take to *murder*, and *dakaits* to robbery, and *dancing girls* follow prostitution, so other members of the least moral portion of the community devote themselves to perjury and forgery, and are willing to hire their services to those who may require them. Just as an unscrupulous Italian will employ a professional assassin to remove his adversary from his path, so an unscrupulous

Some causes of the want of truth in India.

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[1] To understand thoroughly the words "avenge me on mine enemy," one must have dwelt in the East.

[2] The Annals of Crime in India contain more than one instance of persons having *killed themselves* under circumstances from which they intended that it should appear that they were *murdered* by those with whom they were at enmity, and who they expected would be punished for murder.

native of India will employ a professional perjurer or forger to work out his particular scheme of vengeance; and the man who will not hesitate to pay the wages of this iniquity will occasionally himself scruple to forswear himself. It would, however, be a great mistake to suppose that *all* natives of India are addicted to these vices in which *some* natives indulge and for which *some* districts are notorious. The upper and more educated classes are as free from them as the same classes in other countries of equal civilization; and they regret their existence among their less enlightened countrymen.

§ 38. From what has just been said, it will be evident that judicial functionaries in India should be most careful in the oral examination of witnesses. If, however, care be exercised and ordinary attention be devoted to this duty, the Author is persuaded that the task of discovering the truth is not a very difficult one in the great majority of cases, or impossible in any. Few men are really good actors: and there is a remarkable difference between the demeanour of a witness who is describing a scene or occurrence which he actually saw, and that of a witness who repeats from memory a story which has been taught him. The former, while detailing what his eyes have seen, throws an unmistakable vitality into his narrative—his eyes are lit with intelligence, his features are all in motion, his body is scarcely at rest, his hands make indications,—and all these combined together produce a series of pantomimic gestures, illustrative and corroborative of the details of his narrative.[1] The latter, on the other hand, either stands perfectly motionless or is fidgetty and restless; his features are impassive; the pupil of the eye is fixed; he gazes at empty space, instead of watching the face of the Judge or of the examining advocate, to see if he is understood; he

Demeanour of Witnesses.

[1] The above description will apply more or less exactly according to the *race* to which the witness belongs. The majority of witnesses in India (Bengal at least) are—like, but not so much as, Irish peasants—demonstrative when describing what they have seen.

hurries on with his story lest he should lose the thread of it and is impatient of interruption; occasionally as he forgets his cue, the dry white tongue is thrust hurriedly out and as hurriedly withdrawn, or the apple in the throat rises and as suddenly falls; and his whole attitude and demeanour cannot fail to remind his hearers of a schoolboy, repeating, in the presence of a stern pedagogue, and with the fear of the rod before his eyes, a task which he has learned by rote.

Other indications of Truth and Falsehood.

§ 39. I have above described Indian witnesses as I have found them. The following passage from Mr. Taylor's work exhibits another picture, many of the lines of which are also true in India:—"While simplicity, minuteness, and ease are the natural accompaniments of truth, the language of witnesses coming to impose upon the jury is usually laboured, cautious, and indistinct. So when we find a witness over-zealous on behalf of his party; exaggerating circumstances; answering without waiting to hear the question; forgetting facts wherein he would be open to contradiction; minutely remembering others which he knows cannot be disputed; reluctant in giving adverse testimony; replying evasively or flippantly; pretending not to hear[1] the question for the purpose of gaining time to consider the effect of his answer; affecting indifference; or often vowing to God[2] and protesting his honesty,—we have indications more or less conclusive of insincerity and falsehood. On the other hand, in the testimony of witnesses of truth there is a calmness and simplicity; a naturalness of manner; an unaffected readiness and copiousness of detail, as well in one part of the narrative as another; and an evident disregard of either the

[1] In India a witness will with the same object pretend not to understand the Judicial officer's vernacular (not his own, but that of the country), though he has understood and answered every question previous to the crucial one. Whether he has so understood and answered is always important.

[2] In India when a witness spontaneously prefaces his evidence by a declaration that he will tell the truth only and on no account say anything that is false, he is to be suspected.

liability or difficulty of vindication or detection."[1] To the same effect, though in slightly different language, Starkie writes:—"An over-forward and hasty zeal on the part of the witness in giving testimony which will benefit the party whose witness he is, his exaggeration of circumstances, his reluctance in giving adverse evidence, his slowness in answering, his evasive replies, his affectation of not hearing or not understanding the question, for the purpose of gaining time to consider the effect of his answer; precipitancy in answering without waiting to hear or to understand the nature of the question; his inability to detail any circumstances wherein, if his testimony were untrue, he would be open to contradiction; or his forwardness in minutely detailing those where he knows contradiction to be impossible; and affectation of indifference,—are all, to a greater or less extent, obvious marks of insincerity. On the other hand, his promptness and frankness in answering questions without regard to consequences, and especially his unhesitating readiness in stating all the circumstances attending the transaction, by which he opens a wide field for contradiction, if his testimony be false, are, as well as numerous others of a similar nature, strong internal indications of his sincerity."[2]

Interrogative test of Indian witnesses.

§ 40. I have already alluded to the fact that true as well as false witnesses are usually *prepared* in India. Both may, therefore, display the same volubility in the witness-box; but the difference between the true and the false witness becomes very apparent when each is stopped in repeating the story committed to memory and is compelled to answer questions. The true witness may be a little put out at first; but he has a fund of real ideas to fall back upon, and he quickly recovers himself and gives natural and intelligent answers. The false witness, on the other hand, knows only the story he has been taught, and his perplexity and embarrassment are

[1] Vol. I., p. 68, § 45.
[2] Page 822.

too obvious to escape notice, as he racks his memory, perhaps in vain, to try and find in what he has learned by rote suitable replies to the questions that are put to him. Another way of treating a witness suspected of being mendacious is to forbear to express the impression he has inspired. Supposing his tale clear of suspicion, the witness runs on his course with fluency till he is entangled in some irretrievable contradiction at variance with other parts of his own story, or with facts notorious in themselves or established by proofs from other sources.[1] Away from large towns and other haunts of professional witnesses, many of the witnesses who come before the Courts in India are ignorant peasants; and, however carefully they may be prepared, their limited capacity makes it almost impossible for them, if properly examined, to carry a false story successfully through all its stages, more especially if it take them at all out of the experiences of their own every-day life and into matters which are to them strange and unfamiliar.[2] Before leaving the subject of the demeanour of witnesses, I may remark that the Codes of Civil and Criminal Procedure require the Courts to record such remarks as they may think material respecting the demeanour of witnesses while under examination. The object of these provisions is to make up in some respect for the deficiency which Courts of Appeal must labour under in having merely the dead record before them, and not seeing the living witnesses.

Ability of witnesses.

§ 41. Next to and in a certain degree connected with demeanour, it is important to consider the ability of the witness, as well his intellectual capacity as his powers of perception, judgment, memory, and description.[3] Where cognizance of the fact related has been obtained through the sense of sight, the light in which the object was placed is important. Different degrees of weight would properly be

[1] *Licence* of *Counsel*, p. 5.

[2] And see remarks at p. 35, *ante*.

[3] See the following subject discussed more at large by Bentham, p. 162 and following pages: and by Starkie, p. 824. I have borrowed from both.

attached to identification made in broad daylight, by moonlight, by the light of the stars, and during the darkness of the night; and the fact of the person identified being previously known or otherwise to the identifier is also important. In the case of hearing, the sounds which reached the ear may have been faint; or, of the sounds produced by the sonorous body, parts only, and those broken and interrupted, may have reached the ear. In the case of words spoken, the voice of the speaker may have been faint, the distance at which he stood considerable; and some of his words may have excited, while others failed to excite, a distinct perception. If the fact and its circumstances were of such a nature as to be likely to attract the witness's attention, his perception is likely to be the more clear and distinct; while the contrary will be the case, if the transaction was remote or unlikely to excite notice and observation. 'Had the witness any motive or object,' is also important in connection with the degree of attention given to the transaction. Again, perception may have been rendered faint or indistinct by old age. Attention may have been rendered indifferent; judgment hasty, negligent, and erroneous, by want of knowledge, general or particular, absolute or relative,—the fruit of relative experience, observation, information, and meditation. In connection with the same subject Archbishop Whately writes thus—"When the question is as to a fact, it is plain we have to look chiefly to the honesty of a witness, his accuracy and his means of gaining information. When the question is about a matter of opinion, it is equally plain that his ability to form a judgment is no less to be taken into account * * *" (and again) "Even when the question relates to what is strictly a matter of fact, the intellectual character of the witness is not to be wholly left out of the account. A man strongly influenced by prejudice, to which the weakest men are ever the most liable, may even fancy he sees what he does not. And some degree of suspicion may thence attach to the testimony of prejudiced, though honest men, *when their prejudices*

are on the same side with their testimony; for otherwise their testimony may even be the stronger * * * * It is most important, therefore, to remember what is often forgotten—that credulity and incredulity are the *same* habit considered in *reference to different things.* The more easy of belief any one is in respect of what falls in with his wishes or preconceived notions, the harder of belief he will be of anything that opposes them."[1]

§ 42. "Another intellectual cause of incorrectness in human testimony," says Benthan,[2] "is failure of memory. A failure of this sort may have had for its cause either some original faintness or indistinctness in the act or acts of perception, or else the lapse of time, the length of the interval between the point of time at which the fact presented itself to the perception of the witness, and the point of time at which it happens to him to exhibit his statement of it for the information of the Judge. From the weakness of the memory may result two different and in some respects opposite effects—non-recollection and false recollection." As to the latter, he remarks further on, "Without any the least false consciousness as to any point whatever, without any intention or desire of departing in any point from the strict line of truth, a supposed recollection may be false, not only in quantity, quality, or other circumstance, but even *in toto.* I can speak from experience: recollection false even *in toto* is what it has, every now and then, happened to me to detect myself in. I should expect to find this to be the case more or less with every body.* I speak of recollection devoid of all importance, and the expression of which has never gone forth nor been intended to go forth, out of my own breast; and in respect of which all inducements to mendacity, all causes of bias, have consequently been out of the question. One circumstance, however, has been common to all these instances of misrecollection and false recollection: the

Memory considered.

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[1] Whately's Rhetoric, Part I, Chap. II, § 4.
[2] Page 165.

ge of the supposed transaction has been faint and dubious. It has been deduced, as it were, in the way of inference, from some real and better recollected facts, which have operated as evidentiary facts with relation to these false ones. It might be regarded as the work of the imagination, were it not for its having a distinct and solid ground to rest upon in the truth of things. * * * * On the other hand, when the recollection, the internal evidence, is clear and strong to a certain degree, there is no room left for any such external evidence to operate. * * * * A recollection which is false in circumstance only, may be so either by being superadded to such parts of the recollection as are true, or substituted to one or more of them. * * * * A recollection false *in toto* is as easy to describe and conceive as a recollection false in circumstance. It, however, scarcely admits of being realized."

§ 43. The ability of a witness may be defective neither in perception, judgment, nor memory; but he may be unable to describe accurately what he has seen, and the image of which is clear to his own mind. "The picture of the fact," says Bentham, "as painted in the memory of the witness at the time of deposition may be ever so correct; yet if the copy exhibited by the words and other signs employed by him for the expression of it be otherwise than correct, such accordingly will be his evidence. By an infelicity in the expression, the fruit of the most correct perception, and the most retentive memory may be rendered abortive." And if the copy may be incorrect, when the witness speaks the same language as the Judge, how much greater room for incorrectness is there when the vernacular of the witness and of the Judge are different, and, by a process of mental translation, there is presented to the Judge's mind *a copy of the copy* produced by the witness! The danger of inaccuracy in this respect, when European Judges sit to administer justice in a language foreign to them, cannot be over-exaggerated or

Descriptive Powers of witness.

too carefully guarded against. Bentham further remarks that *timidity* is in the case of *vivâ voce* examination perhaps the most frequent cause of incorrectness in the expression. This timidity may arise from inferiority in respect of rank, sex, or age, or from the natural constitution of the individual. In connection with the present topic may also be considered Archbishop Whately's remark that persons unaccustomed to writing or discussion, but possessing natural sagacity and experience in particular departments, have been observed to be generally unable to give a satisfactory reason for their judgments, even on points on which they are actually very good judges.[1] And it may be added that the same persons are often incapable of describing clearly what they thoroughly understand.

Witnesses to be Weighed not Numbered.

§ 44. As a general rule, a Judge should *weigh* not *number* witnesses. The tendency of modern improvements in the rules of evidence has been to admit every kind of evidence, leaving it to the Court to form its own opinion of the weight to be assigned to the evidence when admitted. The old Evidence Act (s. 28, Act II of 1855) enacted that, except in cases of treason, the direct evidence of one witness, who is entitled to full credit, should be sufficient for proof of any fact: and the present Act (s. 134, *post*) enacts that no particular number of witnesses shall, in any case, be required for the proof of any fact. The number of witnesses, therefore, is a less important consideration than the weight to be attached to the individual testimony of each or to the sum of the testimonies of all taken together. But the number of witnesses may nevertheless under certain circumstances be of very great importance. "Where direct testimony," says Mr. Starkie, "is opposed by conflicting evidence, or by ordinary experience, or by the probabilities supplied by the circumstances of the case, the consideration of the number of witnesses becomes most material. It is more improbable that a number of witnesses should be

[1] *Rhetoric*, Part I, Chap. III., § 1.

mistaken, or that they should have conspired to commit a fraud by direct perjury than that one or a few should be mistaken or wilfully perjured. In the next place not only must the difficulty of procuring a number of false witnesses be greatly increased in proportion to the number, but the danger and risk of detection must be increased in a far higher proportion; for the points on which their false statements may be compared with each other, and with ascertained facts, must necessarily be greatly multiplied." The first portion of these remarks applies with far less force in India than in England; but the latter portion is equally applicable in both countries. In false cases in India there is generally no lack of witnesses; and any deficiency in the *weight* of the witnesses individually is sought to be made up by *number*. In fact, one mark of a false case is not uncommonly the extraordinary number of persons who are said to have seen some occurrence, which in the natural course of things could have been witnessed by a limited number of persons only. The Author, speaking from his own experience, believes this to be true of the majority of false cases in India. At the same time cases sometimes arise which illustrate the truth of Mr. Taylor's remark that two or three persons are far more easily found than a larger number, who, from motives of interest or malignity, will combine to aggrandize themselves or to ruin an opponent. Their story, too, being for the most part simple, is readily concocted and remembered, while its very simplicity renders it extremely difficult, on cross-examination, to detect the imposture. It is on this account that the uncorroborated statements of single witnesses, especially when they testify to atrocious crimes, such as rape, &c., or are known, like accomplices, to be persons of bad character, and to have an interest in the result, have ever been regarded with merited distrust, and are now, in practice, generally deemed insufficient to warrant a conviction.[1]

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[1] Vol. I., p. 80, § 58.

It sometimes happens that several witnesses are called, and appear to be bearing concurrent testimony to the same thing, when they are really attesting different things, one witness being called to prove one of the facts, and another witness to prove another of the facts, which go to make up the entire case; but two witnesses never being called to prove the same fact, lest they should contradict each other on cross-examination. Such cases require more than usual caution.

§ 45. One of the commonest cases in India, and by far the most difficult to deal with, is where falsehood is admingled with truth. This happens in various ways, and with different objects. Sometimes the story concocted is to all intents and purposes false, having reference to the purpose for which it is used, although it may have been reared upon a true basis. "If an individual," said Lord (then Mr.) Brougham, on the occasion of a celebrated trial, "were to invent a story entirely—if he were to form it completely of falsehoods, the result would be his inevitable detection; but if he build a structure of falsehood on the foundation of a little truth, he may raise a tale, which, with a good deal of drilling, may put an honest man's life in jeopardy. * * * * * The most effectual way, because the safest, of laying a plot, is not to swear too hard, is not to swear too much or to come too directly to the point; but to lay the foundation in existing facts and real circumstances—to knit the false with the true—to interlace reality with fiction—to build the fanciful fabric upon that which exists in nature—and to escape detection by taking most especial care never to have two witnesses to the same fact, and also to make the facts as moderate and as little offensive as possible." A common instance is an *alibi*, when sought to be proved for a prisoner's defence. Everything may be perfectly true except the *date*. The whole transaction described may have really occurred, and the prisoner may have been a chief actor or one of the actors in the scene, only on a day different from that stated

Admixture of Falsehood with Truth, common in India.

by the witnesses. Again, it happens very commonly in India that a perfectly true case is sought to be proved by false witnesses and forged documents. The actual witnesses of the transaction may be dead, or may be persons who, from their position and from native ideas on these subjects, may be unwilling to come into Court and depose to what they know; or the persons who have charge of the preparation and management of the case, may be, as too often they are, wholly ignorant of the proper mode of proving the facts, which require to be proved in order to succeed. Aiming only at success, they may be wholly unscrupulous as to the methods to be employed in attaining it; or, conscious of the goodness of the cause which they have in hand, and justifying the means by the end, they may think it small harm to use crooked paths in order to secure ultimate justice. It may be also that the hitherto uncertainty and doubt hanging over the rules of evidence binding on the Mofussil Courts, are in some respect responsible for the evils born of the darkness which they have contributed to create. Be this as it may, the fact exists, and should ever be borne in mind by Judges of every grade in India.

§ 46. The duty of the Court in such a case may be gathered from the following remarks of the Calcutta High Court:—

The whole evidence not to be rejected because part is false.

"The (Lower) Court will bear in mind that the use of fabricated written evidence by a party, however clearly established, does not relieve the Court from the duty of examining the whole of the evidence adduced on both sides, and of deciding according to the truth of the matters in issue. The person using such evidence may have brought himself within the penalties of the Criminal Law; but the Court should not, in a Civil suit, inflict a punishment under the name of a presumption. Forgery or fraud in some material part of the evidence, if it is shown to be the contrivance of a party to the proceedings, may afford a fair presumption against the whole of the evidence adduced

by that party, or at least against such portion of that evidence as tends to the same conclusion with the fabricated evidence. It may, perhaps, also have the further effect of gaining a more ready admission for the evidence of his opponents. But the presumption should not be pressed too far, especially in this country, where it happens, not uncommonly, that falsehood and fabrication are employed to support a just cause. In a recent appeal heard by the Privy Council (*Raní Surnamoyí* v. *Máhárájáh Sátis Chándrá Rai Báhádúr*, 23*rd July*, 1864), their Lordships sustained the appeal, although they treated the whole of the parol evidence of the appellant as unworthy of credit, and a confirmatory pottah produced by her as a forged instrument. In the judgment it is said, 'that when false 'witnesses or forged documents are produced in support 'of a case, the fact naturally creates suspicion as to the 'case itself; and if the evidence upon which their Lord-'ships act depended in any degree for its credibility or 'weight on such witnesses or documents, they would 'have paused as to their conclusion. The fact is not 'so, however, in the present case: their Lordships 'believe they have to deal with a just case foolishly 'and wickedly attempted to be supported by false 'evidence. This misconduct must not mislead them in 'the advice they will have to tender to Her Majesty, 'which will be that the appeal be sustained, and the decrees complained of reversed"—(*Garibúla Ghazí and others, Appellants*, v. *Gúrú Das Rai, Respondent.* II. W. R. Act X Rulings, p. 100—and see also *The Bengal Indigo Company, Appellants*, v. *Tariní Persad Ghose, Respondent.* III. W. R., Act X. Rulings, p. 149).[1] In the case of *J. P. Wise and others* v. *Sandalúnissa and others* before the Privy Council on the 25th February, 1867 (Suth. Priv. Coun. Ap., p. 667), the same high authority said:—"In a native case it is not uncommon to find a true case placed on a false foundation, and supported in part by false evidence. It not unfrequently happens that each case, that

[1] And see *Pattabhirannier* v. *Vencatarow Naicken*, VII. B. L. R. P. C. 142.

of the claim and that of the defence, has to struggle through difficulties in which wicked and foolish managers involve it by fabrications of evidence and subornation or tutoring of witnesses; and it is not always a safe conclusion that a case is false and dishonest in which such falsities are found. * * * * * A native, even with an honest case, or his advisers, may fabricate evidence to meet a case, which they fear, though they know it to be groundless."[1]

§ 47. In connection with the same subject, but more especially with reference to the testimony of individual witnesses, Mr. Norton well observes thus:—"There is a maxim—*falsus in uno, falsus in omnibus*,—false in one particular, false in all. I need hardly say that this is everywhere a somewhat dangerous maxim, but especially in India; for if a whole body of testimony were to be rejected, because the witness was evidently speaking untruth in *one* or more particulars, it is to be feared that witnesses might be dispensed with; for in the great majority of cases, the evidence of a native witness will be found tainted with falsehood. There is almost always a fringe or embroidery to a story, however true in the main. The falsehood should be considered in weighing the evidence; and it *may be* so glaring as utterly to destroy confidence in the witness altogether. But when there is reason to believe that the main part of the deposition is true, it should not be arbitrarily rejected because of a want of veracity on perhaps some very minor point." The case will, however, be wholly different if the essential circumstance in the entire story be evidently unfounded. This, to use a felicitous expression of Mr. Hallam's, is *to*

Danger of the maxim "falsus in uno, falsus in omnibus."

[1] The author has heard of a case in which a native forged a bond for a considerable amount, and with the help of false witnesses sued his adversary thereon; who, despairing of showing the falsity of the plaintiff's case, admitted the bond, forged an acquittance and produced an equal number of witnesses to prove this document!

pull a stone out of an arch: the whole fabric must fall to the ground.[1]

Affirmative and Negative evidence.

§ 48. When one witness deposes to a certain fact having occurred, and another witness, stating that he was present at the same time, denies that any such fact took place, greater weight, other things being equal, is to be attached to the witness alleging the affirmative. In the case of *Chaudhrí Debí Persad and Baní Persad* v. *Chaudhrí Daulut Singh* (III. Moore's Indian Appeals, p. 357; Sutherland Priv. Coun. Ap., p. 161), their Lordships of the Privy Council made the following observation:—"In estimating the value of evidence, the testimony of a person who swears positively that a certain conversation took place is of more value than that of one who says that it did not, because the evidence of the latter may be explained by supposing that his attention was not drawn to the conversation at the time."

Witness proving too much.

§ 49. It occasionally happens that the unreliability of a witness's testimony is shown by his *proving too much.* In his eagerness to assist the side on which he is called, he states some fact which to him in his ignorance appears calculated to promote this result, but which taken with other facts proved or admitted has a tendency directly the opposite, and lets in the light on the scenes behind, which have been carefully kept from view; or he makes a statement from which is deducible not only the conclusion sought to be established, but another which is absurd or inadmissible.[2]

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[1] "The tendency of any mixture of error in testimony is to lessen the probability of the whole. This diminution is in many cases so small as not perceptibly to affect our belief. But where an essential circumstance in a story is evidently unfounded, it is to *pull a stone out of an arch:* the whole fabric must fall to the ground."—*Constitutional History of England*, Vol. II., p. 637.

[2] "It is evident that either the *premiss* of an opponent, or his *conclusion* may be disproved, either in the direct or in the indirect method; *i. e.*, by proving the truth of the *contradictory*, or by showing that an absurd conclusion may fairly be deduced from the proposition you are combating. When this latter mode of

In the case of *Suriah Row* v. *Cotaghery Buchiah*, before the Privy Council on the 17th December, 1838 (II. Moo. Ind. App. 113), Lord Brougham made the following remark:—"The observation one cannot help making upon this evidence, is that it proves too much on behalf of the defendant, who gives that suspicious evidence; in answer to which it is ingeniously suggested, as it is often under the pressure of the cause, that it cannot be supposed that the witness was suborned, for that if he was possessed of common shrewdness, he would not have over-done the thing, and thus have given rise to such an objection. That is a very tender argument before a Court, and too doubtful to justify the Court in placing any considerable reliance upon it; for we do find, happily for the ends of justice, that men *do* fall into these inconsistences, and by means thereof the fraudulent character of the evidence becomes apparent. In the opinion of their Lordships, no reliance can be placed upon that remark to rebut the observation to which it is applied."

Danger of attempting to prove too much in a case.

§ 50. In connection with the same point I may remark upon the danger of attempting to prove too much, of ever advancing more than can be well sustained; since the refutation of *that* will often quash the whole. A guilty person may often escape by having too much laid to his charge; so he may also by having too much evidence against him, *i. e.*, some that is not in itself satisfactory: thus a prisoner may sometimes obtain an acquittal by showing that one of the witnesses against him is an infamous person or actuated by some malignant motive, though, perhaps, if that part of the evidence had been omitted, the rest would have been sufficient for conviction. An argument, or a piece of evidence, which has been refuted, ought, strictly speaking, to go for nothing. The

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refutation is adopted with respect to the *premiss*, the phrase by which this procedure is usually designated, is that the "argument proves too much, *i. e.*, that it proves, besides the conclusion drawn, another which is manifestly inadmissible." *Whately's Rhetoric*, Part. I, Chapter III., §. 7.

conclusion sought to be established thereby may be quite true, and may be capable of being established by other arguments or other evidence. Yet men—and Judicial functionaries in common with other men—are apt to take for granted that the conclusion itself is disproved when the arguments or evidence brought forward to establish it have failed or have been satisfactorily refuted. The mistake arises from assuming that these are *all* the arguments that could be urged.[1] If they are *all* the arguments or evidence advanced in that particular case, of course the Judge is right, inasmuch as he is bound to decide *secundum allegata et probata;* but if there are other arguments and other evidence in the case, he must not let his attention be wholly diverted from *these* by the address of an advocate, who directs his attack against those portions only of the adversary's case, which cannot be maintained. A wise general will abandon those outworks which he knows to be incapable of defence, or the attempt to defend which may endanger the safety of his main position; but in the contests of the *forum*, more especially of the Indian *forum*, this caution and care are frequently wanting, a fresh duty being in consequence imposed on the Judge, as the *arbiter* of the result.

Omissions.

§ 51. It will often be necessary to consider the effect of *omissions* in the testimony of witnesses; and, in determining the value to be given to them as indications of truth or falsehood, it will be important to see whether the omission to mention a particular fact arises from wilful suppression, or from the witness's attention being riveted upon some other facts, with describing which his mind is wholly engrossed.[2] If the fact be one which could not possibly have escaped his observation, supposing him to be a true witness, and if, on being indirectly questioned he evince no knowledge of it, or, being directly questioned, deny such knowledge,

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[1] See *Whately's Logic*, B. III., § 18; and *Rhetoric*, Part I., Chap. III., §. 7

[2] See *Wills on Circumstantial Evidence*, p. 292.

the supposition of inadvertence is scarcely possible, and a discrepancy is apparent. The negative circumstance[1] also of a witness's *omitting* to mention such things as it is morally certain he *would* have mentioned had he been investigating, adds great weight to what he does say. Beside the consideration of omissions in the testimony of individual witnesses, it is necessary also to estimate the effect of omissions in the evidence taken as
single witness attest several circumstances, each of which is capable of corroborating evidence; and if no such corroborating evidence is produced, there must be great confidence in the integrity and veracity of this single witness to believe all these circumstances on his sole testimony, where, if they were true, there would be concurrent evidence to strengthen and confirm his statements.[2] The instance of a single link in the chain being wholly wanting requires no particular comment. Where a case is supported by several parallel chains, the want of a link in any one of them renders that particular one wholly useless, and throws the whole strain on the others: but where the support is derived from a single chain only, the failure of a single link, however strong the remaining links may be, must be fatal; and even where the link is not wholly wanting, but merely partly defective, it is well to remember that no chain is stronger than its weakest part. There is, however, one omission, which it is important to notice, inasmuch as a wrong construction is daily put upon it in the lower Courts in India. I speak of the non-production of *all* the evidence which it is possible to offer of any particular fact. From this no adverse conclusion can properly be drawn, if the evidence actually given be sufficient and be unimpeached. In the case of *Ramalinga Pillai* v. *Sudasiva Pillai*, before the Privy Council on the 4th February, 1864,[3] their Lordships said :—" Several witnesses, whose testimony is not directly impeached,

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[1] *Whately's Rhetoric*, Part I., Chap. II., § 4.

[2] See *Gilbert on Evidence*, p. 180.

[3] *IX. Moo. Ind. Ap.* 506.

deposed to these facts; but it was urged in argument that many other persons were present on the occasion who ought to have been produced on the part of the respondent. Where, however, there is sufficient evidence of a fact, it is no objection to the proof of it that more evidence might have been adduced."

§ 52. Analogous to the subject of omissions is the consideration of statements, arguments, and evidence directly put forward and remaining *uncontradicted* by the other side. This is a sort of negative testimony given by *adversaries*, which is often of considerable weight. The direct testimony of adversaries is, of course, of still greater weight. In India such evidence going immediately to the point at issue is not often met with; but, as falling under the head of "undesigned," it occasionally presents itself and may be at times educed by a little skilful examination. In the testimony not of adversaries only, but also of unwilling witnesses, it will generally be found that this consists more in something *incidentally implied* than in a distinct statement. It will, however, sometimes happen that even an adversary will admit something that makes against him in order to contest some other point to his thinking more important.[1] One way in which a hostile witness may, and often does serve the case which he came to damage, is when he appears not to believe himself, or not to understand the thing he is reporting, when it is such as is to his hearers not unintelligible nor incredible[2] by reason of their superior knowledge either generally or in the particular case.

Testimony of Adversaries.

§ 53. When the evidence of witnesses called on opposite sides is directly conflicting, it is a good plan to confront them. "This practice," says Mr. Taylor, "which still prevails largely in the County Courts, and is there

Confronting of witnesses.

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[1] See *Whately's Rhetoric*, Part I., Chap. II., § 4.

[2] *Idem.*

often productive of highly useful results, has, for some unexplained reason, grown into comparative disuse at Nisi Prius. This is to be regretted; for the practice certainly affords an excellent opportunity of contrasting the demeanour of the opposing witnesses, and of thus testing the credit due to each; while it also furnishes the means of explaining away an apparent contradiction, or of rectifying a mistake, where both witnesses have intended to state nothing but the truth." In India, where the evidence *is* so often directly conflicting, this is a most valuable means of discovering the truth, and the Author has often adopted it with success.

Directing witnesses to withdraw.

§ 54. When it appears essential for the elucidation of the truth, the witnesses should be examined out of the hearing of each other. An order for all the witnesses on both sides to withdraw, except the one under examination, will generally be made upon the motion of either party at any period of the trial. If a witness remain in Court in contravention of this order, it is under English law a contempt. It might, perhaps, also be punishable under Section 228 of the Indian Penal Code as an "*interruption.*" A Judge cannot reject the evidence of a witness, who has thus remained in Court, though his disobedience may materially lessen the value of that evidence. In India a *witness-room*, where the other witnesses can be kept out of hearing of the witness under examination, ought to be attached to every Court.

Danger of doubting all native evidence.

§ 55. Some Judicial officers in India are apt to commit the mistake of disbelieving almost all evidence that is brought before them. Convinced of the general fallibility of native evidence, they suspect every witness and doubt every document produced in every case; and not unfrequently their administration of justice (more especially in criminal cases) resolves itself into a sceptical scrutiny of the evidence offered to their judgment, in which if they can find some traces of falsehood, they immediately reject

the whole. This happens more especially at the second stage of a judicial career (the first stage being generally that of too implicit belief), before competent knowlege and experience of the country and its usages and of native habits, manners, tendencies and proclivities have taught the happy medium that lies between either extreme. The following observations of the Lords of the Privy Council made in written judgments delivered in appeals from India may be useful in counteracting the error to which I refer:—"It is quite true that such is the lamentable disregard of truth prevailing amongst the native inhabitants of Hindustan that all oral evidence is necessarily received with great suspicion, and when opposed by the strong improbability of the transaction to which they depose, or weakened by the mode in which they speak, it may be of little avail. But we must be careful not to carry this caution to an extreme length, nor utterly to discard oral evidence merely because it is oral, nor unless the impeaching or discrediting circumstances are clearly found to exist. It would be very dangerous to exercise the judicial function as if no credit could necessarily be given to witnesses deposing *vivâ voce*, how necessary soever it may be always to sift such evidence with great minuteness and care." (*Madhú Súdhun Sandyal* v. *Sarúp Chandra Sircar Chowdhrí*, before the Privy Council on the 27th and 28th June, 1849. IV. Moo. Ind. Ap. 431.) "This evidence is wholly uncontradicted, and yet, surely, if capable of contradiction, some evidence might have been adduced to impeach its credibility—some evidence either to show that the facts did not take place as stated, or to throw a doubt upon the testimony as to the handwriting. We have no such evidence; we must, therefore, necessarily come to the conclusion that the genuineness of the document is established. It would, indeed, be most dangerous to say that, where the probabilities are in favour of the transaction, we should conclude against it solely because of the general fallibility of native evidence. Such an argument would go to an extent which can never be

maintained in this or any other Court, for it would tend to establish a rule that all oral evidence must be discarded; and it is most manifest that, however fallible such evidence may be, however carefully to be watched, justice never can be administered in the most important causes without recourse to it." (*Banwarí Lal* v. *Hetnarain Singh*, before the Privy Council on the 22nd February 1858. VII. Moo. Ind. Ap. 148.)

§ 56. "Their Lordships are of opinion that no weight whatever ought to the given to the evidence of a witness who himself comes and says, not only that the deeds were forged, but that he himself had been a party to the making of them * * * * * Their Lordships are of opinion that although no doubt it may be desirable carefully to examine cases of possible fraud, yet that instruments which are proved by all the attesting witnesses, and against which there is no evidence on the other side, ought not to be set aside and treated as worth nothing on a mere possible suspicion of perjury and forgery." (*Kalí Chandra Chowdhrí* v. *Sib Chandra Bhadúrí and others*, before the Privy Council on the 8th December 1870. VI. B. L. Rep. 501.)—"Had their Lordships found that his (*i. e.* the Judge's, who tried the case in the first instance) observations upon the witnesses themselves were opposed to the opinion of the Sádr Court upon the credit due to those witnesses, irrespective of the probabilities of the case, they must necessarily have compared the conflicting opinions, and the result might have been a conclusion that the case must be decided in a conflict of testimony nearly balanced by the preponderance of probabilities. But if there be found, even in a native case, positive credible testimony unimpeached, and credited by a Judge competent to judge of the credit due to witnesses, it would seem to be equivalent to a total disregard of native testimony, to say, despite of this positive testimony, we will put all evidence aside and act alone on the probabilities of the stories and the inference from the conduct of the parties." (*J. P. Wise and others* v. *Sandalúnissa Chaudhraní and*

others, before the Privy Council on the 8th and 9th February, 1867. XI. Moo. Ind. Ap. 177.)

Further hints for dealing with evidence.

§ 57. The following remarks are also important as guides to the proper mode of dealing with evidence:—"Undoubtedly there are in the evidence circumstances which may create suspicion, and doubt may be entertained with regard to the truth of the case made by the appellant; but in matters of this description it is essential to take care that the decision of the Court rests, not upon suspicion, but upon legal grounds, established by legal testimony." (*Sríman Chandra Dey* v. *Gopal Chandra Chackravartti and another*, before the Privy Council on the 14th November, 1866. XI. Moo. Ind. Ap. 28.)—"The consideration of a case upon evidence can seldom be satisfactory, unless all the presumptions for and against a claim, arising on all the evidence offered, or on proof withheld, on the course of pleading, and tardy production of important portions of a claim or defence, be viewed in connection with the oral or documentary proof which *per se* might suffice to establish it. This caution is more particularly necessary in India, where fabrication of seals and documents is so common and so skilfully conducted." (*Máhárájá Rajendra Kishwar Singh* v. *Seoparshan Misser*, before the Privy Council on the 7th and 8th February 1866. X. Moo. Ind. Ap. 438.)—"Amongst other arguments urged for the respondents, it was said that, with regard to instruments of this kind, considering the habits and customs of the native inhabitants of India, their well-known propensity to forge any instrument which they might deem necessary for their interest, and the extreme facility with which false evidence can be procured from witnesses, *the probability or improbability of the transaction* formed a most important consideration in ascertaining the truth of any transaction relied upon. With this argument we agree: and therefore it will become our duty to examine with care how far the defence relied upon is consistent with all the probabilities of the case. It has been said also that this defence

stands exclusively upon oral evidence; and though, to a considerable extent, that observation may be true, yet it cannot be received to the full extent to which it has been urged. The defence in this case does, it must be admitted, depend upon the proof of a given instrument, but there is a very clear distinction, and not an unimportant one, between the pleading a written instrument as an answer to a demand, and the setting up a defence founded exclusively upon oral evidence; for instance, if the defence were adoption, where there was no written record of the transaction, and the fact was to be established merely by the evidence of witnesses who swear they were present at it, there the proof would be purely oral evidence, and might be liable to all the imputations which are in these cases cast upon it; but where the defence is rested upon a written document as a release, there is an essential difference, for its genuineness, on the contrary, may be shown by many facts and circumstances very different from mere oral evidence; and, moreover, the witnesses, who are to prove a written document, cannot resort to that latitude of statement which affords such opportunity of fabrication to purely oral evidence. There are more means of trying the genuineness of a written instrument, than there can be in disproving purely oral evidence. This is quite manifest even upon the present occasion, for the truth of the transaction may, as it has been, be investigated by reference to the handwriting, to the seal, to the stamps,[1] the

[1] Only a few months ago the Author discovered a forgery in a case which came before him in appeal by examining the stamp. A conveyance purporting to have been executed in 1855 was engrossed on a stamp paper bearing the Royal arms of England with V. R. and a crown above. *This paper was not manufactured till* 1859, when Her Majesty assumed the Government of India. The paper in use previously bore the arms of the East India Company with the letters E I C. The forger had partly erased the letters V. R. and the crown; but the minute device on the arms and the difference of the motto wholely escaped him. The Author has also more than once detected forgeries by the presence or absence of the distinguishing mark impressed on stamps issued before the mutiny—See Act XIX of 1858. It would be very easy to mark all stamp paper with the date of issue by means of an instrument, such as is used to mark Railway tickets: and the Author is convinced that this simple contrivance would do much to stop forgery by

description of the paper, the alleged habits of him who is said to have written it." (*Banwarí Lal* v. *Hetnarain Singh*, before the Privy Council on the 22nd February, 1858. VII. Moo. Ind. Ap. 148.)—"Had that been her case, she might have proved it by the books of the business which are presumably in her power and custody, the evidence of gomashtas, or the like. If the Principal Sádr Amín thought that his hypothesis was according to the truth of the case and the real rights of the parties, he should have established it by pursuing the enquiry and by calling for the production of proper proof. Mír Daulat's testimony falls very far short of such proof. And the conclusion of the Principal Sádr Amín as to the partnership seems to rest principally on his own knowledge and belief, or public rumour—grounds upon which no Judge is justified in acting." (*Mithun Bíbí* v. *Bashír Khan and others*, before the Privy Council on the 9th February, 1867. XI. Moo. Ind. Ap. 213.)

§ 58. Now that the *Evidence Act* has come into operation, the following observations are not possessed of the same importance which attached to them under the former state of things. They may, however, even now be well borne in mind, more especially in dealing with cases tried by the Courts of original jurisdiction before the Evidence Act came into operation :—"Objections have been taken to the admissibility of this document as evidence, and it has been contended to be a copy of a copy. With regard to the admissibility of evidence in the Native Courts in India, we think that no strict rule can be prescribed. However highly we may value rules of evidence as acknowledged and carried out in our own Courts, we cannot think that those rules could be applied with the same strictness to

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facilitating detection. In a large number of forgeries, it is necessary to antedate; and the difficulty of procuring a stamp with a suitable date could be increased if stamp-vendors were made to account more strictly for their sales than is at present the practice. The check of having the purchaser's name endorsed on the stamp is useless, as fictitious names are used. The Author has detected more than one stamp-vendor, having stamps *ready endorsed* with such fictitious names.

the reception of evidence before the Native Courts in the East Indies, where it is perfectly manifest the practitioners and the Judges have not that intimate acquaintance with the principles which govern the reception of evidence in our own tribunals: we must look to their practice—we must look to the essential justice of the case—and not hastily reject any evidence because it may not be accordant with our own practice. We must endeavour, as far as the materials will allow us, having received the evidence, to ascertain what weight ought properly to be ascribed to it, and, more especially, where we find that it has been the practice of the Courts to receive documentary evidence without the strict proof which might here be considered necessary, we must not reject that evidence; indeed, the consequence of so doing must inevitably be, if the strict rule were adhered to, to reject the most important evidence not only in this case, but almost in every other. Looking through the whole of these papers, we see that, both on the side of appellant and respondents, copies of documents coming out of a public office have been received upon the certificate that they were true copies, signed by the officer in the charge of that department, and that whether produced by the plaintiff or the defendant in the cause. We entertain no doubt, therefore, that this document must be received in evidence; but what weight is to be ascribed to it still remains to be considered." *Unidi Rajaha Raje Venkataperumal Rauze Báhádúr* v. *Pemmasamí Venkatadry Naidú and others*, before the Privy Council on the 12th and 13th December, 1858. VII. Moo. Ind. Ap. 128. The rule here laid down was referred to and approved in the more recent case of *Ajodhya Persad Singh and another* v. *Amrao Singh and others*, before the Privy Council on the 1st December, 1870, VI. B. L. Rep. 509, where the testimony of a trustworthy witness that a person was to his knowledge *reputed* insane, was held to be an important corroboration of the direct testimony given to the fact of that person's insanity at the time, though perhaps such evidence might not have been receivable at a trial in a Court of Justice in England.

§ 59. In conclusion, it is no less true in India than in England, that misrepresentation of argument—attempts to suppress evidence—reviling and personality and false charges—afford presumptions that the cause against which they are brought, is—in the opinion of adversaries at least—unassailable on the side of truth.[1] Occasionally, however, these weapons, like perjury and forgery, will be found in India arrayed on the side of a good cause, owing to the ignorance or depravity of those who have the management of it. The tyro may exclaim that the task of discovering truth must be hopeless if the marks of falsehood are to be found even on the side of truth; but time and experience will teach him that it is possible to separate the wheat from the tares. Even those who have had the benefit of experience will often be in *doubt:* but doubt, be it remembered, is wholly consistent with sound inference and a right conclusion. "There are objections," said Dr. Johnson, "against a *plenum,* and objections against a *vacuum,* but one of them must be true." So there may be truth supported by irrefragable arguments, and yet at the same time obnoxious to objections numerous, plausible, and by no means easy of solution.[2] On this point also let me quote Archbishop Whately:—"It is in strictly scientific reasoning alone that all the arguments which lead to a false conclusion must be fallacious. In what is called moral or probable reasoning, there may be sound arguments and valid objections on both sides, *e. g.*, it may be shown that each of two contending parties has some reason to hope for success, and this by irrefragable arguments on both sides, leading to conclusions which are not, strictly speaking, contradictory to each other; for, though only one party can obtain the victory, it may be true that each has some reason to expect it. The real

Doubt consistent with accurate inference.

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[1] *Whately's Rhetoric,* Part I, Chap. II, § 4. It is common to find the parties to a case in India styling each other and each other's witnesses, "professional perjurors, or forgers," &c. It is to be wished that the Courts would take a little more trouble than they do to prevent the introduction of scandalous matter.

[2] *Dr. Hawkins on Tradition.*

question in such cases is, which event is the *more* probable;—on which side the evidence preponderates? Now, it often happens that the inexperienced reasoner, thinking it necessary that every objection should be satisfactorily answered, will have his attention drawn off[1] from the arguments of the opposite side, and will be occupied, perhaps, in making a weak defence, while victory was in his hands. The objection, perhaps, may be unanswerable, and yet may safely be allowed, if it can be shown that more and weightier objections lie against every other supposition."[2]

The *whole* evidence to be considered.

§ 60. The great end and excellence at which a Judicial functionary should endeavour to aim is to take a comprehensive view of *all* the evidence, *all* the probabilities on both sides; comparing the *whole* of what is arrayed on one side with the *whole* of what is arrayed on the other side, and not suffering his mind and attention to be concentrated unduly on any one portion so as to lead to his considering too perfunctorily or wholly omitting to consider other portions either on the same side (where the effect of *combination* is important), or on the opposite side (where the effect of *contradiction* is of consequence). The generality of men are much better qualified for understanding (to use Lord Bacon's words) "particulars, one by one," than for taking a comprehensive view of a whole; and therefore in a *galaxy* of evidence, as it may be called, in which the brilliancy of no single star can be pointed out, the lustre of the combination is often lost on them.[3] Those, however, who have not received this particular qualification from Nature, may do much to acquire it by labour and self-training—*Labor omnia vincit.*[4]

NOTE.—In addition to what has been said at page 54 as to the mode of dealing with true cases sought to be supported by false evidence and forged documents, the following remarks of their Lordships of the

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[1] The inexperienced Judicial functionary may in a similar manner have his attention drawn off by a skilful advocate from the arguments of the (to him) opposite side.

[2] *Rhetoric*, Part I, Chap. III, § 7.

[3] *Idem*, Part I, Chap. II, § 4.

[4] "Labour conquers all things."

Privy Council are also valuable:—"That a party is precluded from relying upon a title established by a deed conclusively found to be genuine because he has foolishly and wickedly set up a false deed, which, if treated as a conveyance, and not as a mere confirmation, may be inconsistent with that title, is a proposition for which there is no foundation either in reason or law."—*Pattabhiramier* v. *Vencatarow Naicken*, VII B. L. R., 143, before the Privy Council on 20th January 1871. "It might be possibly an advantageous rule if, as Mr. Scott expresses in his judgment, that where a party 'has resorted to forgery to establish his claim, he must take the consequences of his own act, and that the Court is not at liberty to assume for him a position which he has himself rejected.' But their Lordships are unable to arrive at that conclusion, and are apprehensive that, if such was the practice adopted, some cases might occur in which the Court could not determine the point in issue in favour of either party..... We find also in a recent case, *Ranî Súrnomoyi* v. *Màhàrajà Satish Chandra Rai*, this Committee gave effect to the defendant's title, although a document by which she sought to strengthen it was found to be a forgery. The evidence which is not susceptible of being forged is *primâ facie* strongly in favour of the defendant. However much the want of trustworthiness in the evidence of cases from India is to be regretted, we cannot, by reason of the proof that a document adduced by one party is forged, transfer the property in which he and those through whom he claims have been in possession at the date of the suit for forty-four years to another who has not, in the opinion of their Lordships, established any right to it himself."—*Sevvaji Vijaya Raghunadha Valojî Kristnan Gopalar* v. *Chinna Nayana Chetti*, X. Moo. Ind. Ap., 161—163.

The following Act of the Governor-General of India in Council received the assent of His Excellency the Governor-General on the 15th March 1872:—

ACT I OF 1872.

Preamble.

WHEREAS it is expedient to consolidate, define and amend the Law of Evidence; It is hereby enacted as follows:—

PART I.

RELEVANCY OF FACTS.

CHAPTER I.—PRELIMINARY.

Short title.

1. This Act may be called "The Indian Evidence Act, 1872:"

Extent.

It extends to the whole of British India, and applies to all judicial proceedings in or before any Court, including Courts Martial, but not to affidavits presented to any Court, or Officer, nor to proceedings before an arbitrator;

Commencement of Act.

and it shall come into force on the first day of September 1872.

["British India" means the territories vested in Her Majesty by the 21st and 22nd Vic., Cap. CVI, Sec. 1 (passed 2nd August 1858), with the exception of the Straits Settlement, which, under the provisions of the 29th and 30th Vic., Cap. CXV, ceased to be part of India.

As to proceedings before arbitrators, see Chapter VI, Sections 312—327 of the Code of Civil Procedure, Act VIII of 1859.]

Repeal of enactments.

2. On and from that day the following laws shall be repealed:—

(1.) All rules of evidence not contained in any Statute, Act or Regulation in force in any part of British India:

(2.) All such Rules, Laws and Regulations as have acquired the force of law under the twenty-fifth section of 'The Indian Councils' Act, 1861,' in so far as they relate to any matter herein provided for; and

(3.) The enactments mentioned in the schedule hereto, to the extent specified in the third column of the said schedule.

But nothing herein contained shall be deemed to affect any provision of any Statute, Act or Regulation in force in any part of British India and not hereby expressly repealed.

[Clause (1) of this section will preclude the Courts from following English rules of evidence in future.—See Introduction, pages 16—19.

Section 25 of "The Indian Councils' Act, 1861" (24th and 25th Vic., Cap. LXVII) is as follows:—"Whereas doubts have been entertained whether the Governor-General of *India*, or the Governor-General of *India* in Council, had the power of making rules, laws and regulations for the territories known from time to time as 'Non-Regulation Provinces, except at meetings for making laws and regulations in conformity with the provisions of the said Acts of the third and fourth years of King *William* the Fourth, Chapter eighty-five, and of the sixteenth and seventeenth years of Her Majesty, Chapter ninety-five, and whether the Governor or Governor in Council, or Lieutenant-Governor of any Presidency or part of *India*, had such power in respect of any such territories: Be it enacted that no rule, law or regulation which, prior to the passing of this Act, shall have been made by the Governor-General or Governor-General in Council, or by any other of the authorities aforesaid, for and in respect of any such Non-Regulation Province, shall be deemed invalid only by reason of the same not having been made in conformity with the provisions of the said Acts, or of any other Act of Parliament respecting the constitution and powers of the Council of *India* or of the Governor-General, or respecting the powers of such Governors or Governors in Council, or Lieutenant-Governors as aforesaid." This section has been interpreted as prohibiting the making of rules, &c., for the Non-Regulation Provinces otherwise than at meetings of the Councils for framing laws and regulations; and in consequence none such have been made since 1861. For the legislative powers which may now be exercised by the above named authorities otherwise than at such meetings, see the 33rd Vic. Cap. II, and the *Introduction* to the Author's *Chronological Table of and Index to the Indian Statute Book*, page 18.

The proviso is important. There are several provisions of statutes of the British Parliament and of Acts of the Indian Legislature which relate to the subject of evidence, and which are in force in India. Such of these as are important will be found in their proper place in the notes that follow. It may be well to remember that the "Evidence Act" does not contain positively the whole of the law of evidence as enacted by the Legislature; but at the same time there are no other Rules of Evidence now in force in India, except such as are contained in this Act or in some other Statute, Act or Regulation in force in British India.]

Interpretation-clause.

3. In this Act the following words and expressions are used in the following senses, unless a contrary intention appears from the context:—

"Court."

"Court" includes all Judges and Magistrates, and all persons, except arbitrators, legally authorized to take evidence.

"Fact"

"Fact" means and includes—

(1) any thing, state of things, or relation of things, capable of being perceived by the senses;

(2) any mental condition of which any person is conscious.

Illustrations.

(*a.*) That there are certain objects arranged in a certain order in a certain place, is a fact.

(*b.*) That a man heard or saw something is a fact.

(*c.*) That a man said certain words is a fact.

(*d.*) That a man holds a certain opinion, has a certain intention, acts in good faith, or fraudulently, or uses a particular word in a particular sense, or is or was at a specified time conscious of a particular sensation, is a fact.

(*e.*) That a man has a certain reputation is a fact.

'Relevant.'

One fact is said to be relevant to another when the one is connected with the other in any of the ways referred to in the provisions of this Act relating to the relevancy of facts.

[Chapter II, Sections 5 to 55, treats of the Relevancy of Facts.]

"Facts in issue."

The expression "Facts in issue" means and includes—

any fact from which, either by itself or in connection with other facts, the existence, non-existence, nature, or extent of any right, liability, or disability, asserted or denied in any suit or proceeding necessarily follows.

Explanation.—Whenever, under the provisions of the law for the time being in force relating to Civil Procedure, any Court records an issue of fact, the fact to be asserted or denied in the answer to such issue, is a fact in issue.

[The law at present in force will be found in Sections 139—143 of Act VIII of 1859.]

Illustrations.

A is accused of the murder of B.

At his trial the following facts may be in issue:—

That A caused B's death;

That A intended to cause B's death;

That A had received grave and sudden provocation from B;

That A, at the time of doing the act which caused B's death, was, by reason of unsoundness of mind, incapable of knowing its nature.

"Document."

"Document" means any matter expressed or described upon any substance by means of letters, figures, or marks, or by more than one of those means, intended to be used, or which may be used, for the purpose of recording that matter.

[This definition is the same as that contained in Sec. 29 of the Penal Code, with the exception of the *last seven words* which have been substituted for "as evidence of that matter."]

Illustrations.

A writing is a document.

Words printed, lithographed or photographed are documents.

A map or plan is a document.

An inscription on a metal plate or stone is a document.

A caricature is a document.

"Evidence."

"Evidence" means and includes—

(1) all statements which the Court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry;

such statements are called oral evidence:

(2) all documents produced for the inspection of the Court;

such documents are called documentary evidence.

[The Bill as originally drafted contained a third subdivision included in the definition of "Evidence," namely—

"(3) All material things other than documents produced for the inspection of the Court;

Such things are called material evidence."

An example of such *material* evidence is the weapon or other article of property, which the 198th section of the Code of Criminal Procedure requires to be transmitted to the Court of Session or High Court, when an accused person is committed for trial by either of these Courts. The *Select Committee* stated in their *Second Report* that they had resolved to omit the above provisions relating to material evidence; but they mentioned no reason for this determination. It is to be observed, however, that a Judge can see such things for himself with his own eyes, and the knowledge derivable therefrom is obtained without the use of any *medium*. Witnesses, who have become acquainted with a fact by the use of their own senses, are the *medium* whereby knowledge of that fact is communicated to the Court. A document is the *medium* whereby knowledge of the matters expressed or described therein is conveyed to the Court; but when a blood-stained weapon or a broken box is presented to the Judge's view, all the knowledge derivable therefrom is obtained without the use of any other *medium* than that of his own senses. Another kind of material evidence, to which the same remarks apply, is the *inspection of the locality* by the Court. The 58th section of the Common Law Procedure Act, 1854, provides for the inspection by the Court or a Judge of *any real or personal property, the inspection of which may be material to the proper determination of the question in dispute.* The Indian Code of Civil Procedure contains no similar provision: but Munsifs and other Judges of Civil Courts in the Mofussil usually visit and inspect the locality, when they see occasion to do so. Section 253 of the Code of Criminal Procedure provides for a view by the Jury or Assessors of *the place in which the offence charged is said to have been committed, or any other place in which any other transaction material to the enquiry in the trial took place.*]

"Proved."

A fact is said to be proved when, after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists.

"Disproved."

A fact is said to be disproved when, after considering the matters before it, the Court either believes that it does not exist, or considers its non-existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it does not exist.

"Not proved."

A fact is said not to be proved when it is neither proved nor disproved.

[See the remarks as to Belief, Disbelief, &c., page 36 of the *Introduction*.]

"May presume."

4. Whenever it is provided by this Act that the Court may presume a fact, it may either regard such fact as proved, unless and until it is disproved, or may call for proof of it.

"Shall presume."

Whenever it is directed by this Act that the Court shall presume a fact, it shall regard such fact as proved, unless and until it is disproved.

"Conclusive proof."

When one fact is declared by this Act to be conclusive proof of another, the Court shall on proof of the one fact regard the other as proved, and shall not allow evidence to be given for the purpose of disproving it.

[As to *Presumptions*, see Sections 79 to 90, *post*.

The cases where the Court *may* (and *does*) presume and *shall* presume correspond to the *disputable* or *rebuttable* presumptions of other systems of evidence. The last paragraph of the section, relating to "Conclusive proof" includes what are called in the same systems *conclusive*, or *imperative*, or *absolute* or *irrebuttable* presumptions.

This Chapter, as originally drafted, contained the following section:—

"Courts shall form their opinions on matters of fact by drawing inferences—

(1) from the evidence produced to the existence of the facts alleged;

(2) from facts proved or disproved to facts not proved;

(3) from the absence of witnesses who, or of evidence which, might have been produced;

(4) from the admissions, statements, conduct and demeanour of the parties and witnesses, and generally from the circumstances of the case."

The *Select Committee* decided to omit this section "as being suitable rather for a treatise than an Act." The object of its introduction was originally stated to be *to point out and put distinctly upon record the fact that to infer, and not merely to accept or register evidence is in all cases the duty of the Court.*"—Archbishop Whately says: "To *infer* is to be regarded as the proper office of the Judge; to *prove*, of the Advocate." And he defines "inferring" as the ascertainment of the truth by investigation; and "proving," as the establishment of it to the satisfaction of another.—*Rhetoric, Introduction*, § 1.]

CHAPTER II.—OF THE RELEVANCY OF FACTS.

Evidence may be given of facts in issue and relevant facts.

5. Evidence may be given in any suit or proceeding of the existence or non-existence of every fact in issue and of such other facts as are hereinafter declared to be relevant, and of no others.

[For definition of "Facts in issue," see *ante*, Section 3, page 74.]

Explanation.—This section shall not enable any person to give evidence of a fact which he is disentitled to prove by any provision of the law for the time being in force relating to Civil Procedure.

Illustrations.

(*a.*) A is tried for the murder of B by beating him with a club with the intention of causing his death.

At A's trial the following facts are in issue—

A's beating B with the club;

A's causing B's death by such beating;

A's intention to cause B's death.

(*b.*) A suitor does not bring with him, and have in readiness for production at the first hearing of the case,

a bond on which he relies. This section does not enable him to produce the bond or prove its contents at a subsequent stage of the proceedings, otherwise than in accordance with the conditions prescribed by the Code of Civil Procedure.

[Section 39 of the Code of Civil Procedure, Act VIII of 1859, enacts as follows:—

"When the plaintiff sues upon any written document, or relies upon any such document as evidence in support of his claim, he shall produce the same in Court when the plaint is presented, and shall at the same time deliver a copy of the document to be filed with the plaint; if the document be an entry in a shop-book or other book, the plaintiff shall produce the book to the Court, together with a copy of the entry on which he relies. The Court shall forthwith mark the document for the purpose of identification; and after examining and comparing the copy with the original, shall return the document to the plaintiff. The plaintiff may, if he think proper, deliver the original document to be filed instead of the copy. The Court may, if it see sufficient cause, direct any written document so produced to be impounded and kept in the custody of some Officer of the Court, for such period and subject to such conditions as to the Court shall seem meet. *Any document not produced in Court by the plaintiff when the plaint is presented shall not be received in evidence on his behalf at the hearing of the suit without the sanction of the Court.*"

Section 128 of the same Code is as follows:—

"The parties or their pleaders shall bring with them, and have in readiness at the first hearing of the suit to be produced when called upon by the Court, all their documentary evidence of every description which may not already have been filed in Court, and all documents, writings, or other things which may have been specified in any notice which may have been served on them respectively within a reasonable time before the hearing of the suit; and no documentary evidence of any kind, which the parties or any of them may desire to produce, shall be received by the Court at any subsequent stage of the proceedings, *unless good cause be shown to its satisfaction for the non-production thereof at the first hearing.*"

"This hearing, it will be observed, is the defendant's first opportunity (and last, unless good cause be shown) for production of documentary evidence. It is also an opportunity (and the last, unless good cause be shown) for the plaintiff, *with the sanction of the Court*, to produce any documents which he may not have produced in Court with his plaint."—*Calcutta High Court Circular Order No.* 9, *of the* 26*th February* 1867, *Page* 190 *of Vol. I of the Author's Edition.*]

Relevancy of facts forming part of same transaction.

6. Facts which, though not in issue, are so connected with a fact in issue as to form part of the same transaction, are relevant, whether they occurred at the same time and place or at different times and places.

Illustrations.

(*a.*) A is accused of the murder of B by beating him. Whatever was said or done by A or B or the by-standers at the beating, or so shortly before or after it as to form part of the transaction, is a relevant fact.

(*b.*) A is accused of waging war against the Queen by taking part in an armed insurrection in which property is destroyed, troops are attacked, and gaols are broken open. The occurrence of these facts is relevant, as forming part of the general transaction, though A may not have been present at all of them.

(*c.*) A sues B for a libel contained in a letter forming part of a correspondence. Letters between the parties relating to the subject out of which the libel arose, and forming part of the correspondence in which it is contained, are relevant facts, though they do not contain the libel itself.

(*d.*) The question is whether certain goods ordered from B were delivered to A. The goods were delivered to several intermediate persons successively. Each delivery is a relevant fact.

[Similarly Magistrates holding an inquiry into cases triable by the Court of Session or High Court are directed by Section 190 of the Code of Criminal Procedure (Act X of 1872) to take the evidence of the complainant and of such persons as are stated to have any knowledge of the facts which form the subject-matter of the accusation, *and the attendant circumstances.*]

Facts which are occasion, cause, or effect of facts in issue.

7. Facts which are the occasion, cause, or effect immediate or otherwise, of relevant facts, or facts in issue, or which constitute the state of things under which they happened, or which afforded an opportunity for their occurrence or transaction, are relevant.

Illustrations.

(*a.*) The question is, whether A robbed B.

The facts that, shortly before the robbery, B went to a fair with money in his possession, and that he showed it, or mentioned the fact that he had it, to third persons, are relevant.

(*b.*) The question is, whether A murdered B.

Marks on the ground, produced by a struggle at or near the place where the murder was committed, are relevant facts.

(*c.*) The question is, whether A poisoned B.

The state of B's health before the symptoms ascribed to poison, and habits of B, known to A, which afforded an opportunity for the administration of poison, are relevant facts.

Motive, preparation and previous or subsequent conduct.

8. Any fact is relevant which shows or constitutes a motive or preparation for any fact in issue or relevant fact.

The conduct of any party, or of any agent to any party, to any suit or proceeding in reference to such suit or proceeding, or in reference to any fact in issue therein or relevant thereto, and the conduct of any person an offence against whom is the subject of any proceeding, is relevant, if such conduct influences or is influenced by any fact in issue or relevant fact, and whether it was previous or subsequent thereto.

[It was at one time thought necessary in England, and it seems to be still necessary in America, that the conduct should be *contemporaneous*. Of late years, however, this doctrine has been rejected in England, and the rule now is that, although concurrence of time must always be considered as material to show the connection, it is by no means essential. Concurrence of time may, however, be important in estimating the *weight* to be given to the evidence when admitted.]

Explanation 1.—The word "conduct" in this section does not include statements, unless those statements accompany and explain acts other than statements: but this explanation is not to affect the

relevancy of statements under any other section of the Act.

[As to *statements*, see Sections 32–39, *post*.]

Explanation 2.—When the conduct of any person is relevant, any statement made to him or in his presence or hearing, which affects such conduct, is relevant.

Illustrations.

(*a*.) A is tried for the murder of B.

The facts that A murdered C, that B knew that A had murdered C, and that B had tried to extort money from A by threatening to make his knowledge public, are relevant.

(*b*.) A sues B upon a bond for the payment of money. B denies the making of the bond.

The fact that, at the time when the bond was alleged to be made, B required money for a particular purpose, is relevant.

(*c*.) A is tried for the murder of B by poison.

The fact that, before the death of B, A procured poison similar to that which was administered to B, is relevant.

(*d*.) The question is whether a certain document is the will of A.

The facts that, not long before the date of the alleged will, A made inquiry into matters to which the provisions of the alleged will relate, that he consulted vakíls in reference to making the will, and that he caused drafts of other wills to be prepared, of which he did not approve, are relevant.

(*e*.) A is accused of a crime.

The facts that, either before, or at the time of, or after the alleged crime, A provided evidence which would tend to give to the facts of the case an appearance favourable to himself, or that he destroyed or concealed evidence, or prevented the presence or procured the absence of persons who might have been witnesses, or suborned persons to give false evidence respecting it, are relevant.

(*f*.) The question is, whether A robbed B.

The facts that, after B was robbed, C said in A's presence—'the police are coming to look for the man who robbed B,'—and that immediately afterwards A ran away, are relevant.

(*g*.) The question is, whether A owes B rupees 10,000.

The facts that A asked C to lend him money, and that

D said to C in A's presence and hearing—'I advise you not to trust A, for he owes B 10,000 rupees,'—and that A went away without making any answer, are relevant facts.

(*h.*) The question is, whether A committed a crime.

The fact that A absconded after receiving a letter warning him that inquiry was being made for the criminal, and the contents of the letter, are relevant.

(*i.*) A is accused of a crime.

The facts that, after the commission of the alleged crime, he absconded, or was in possession of property or the proceeds of property acquired by the crime, or attempted to conceal things which were or might have been used in committing it, are relevant.

(*j.*) The question is, whether A was ravished.

The facts that, shortly after the alleged rape, she made a complaint relating to the crime, the circumstances under which and the terms in which the complaint was made, are relevant.

The fact that, without making a complaint, she said that she had been ravished is not relevant as conduct under this section, though it may be relevant

as a dying declaration under section thirty-two, (one), or

as corroborative evidence under section one hundred and fifty-seven.

(*k.*) The question is, whether A was robbed.

The fact that, soon after the alleged robbery, he made a complaint relating to the offence, the circumstances under which, and the terms in which, the complaint was made are relevant.

The fact that he said he had been robbed without making any complaint is not relevant as conduct under this section, though it may be relevant

as a dying declaration under section thirty-two, clause (one), or

as corroborative evidence under section one hundred and fifty-seven.

[These last two *illustrations* are important. Under English law the *particulars* of the complaint may not be disclosed by the witnesses for the prosecution either as original or as confirmatory evidence, but the details of the statement can only be elicited by the prisoner's counsel on cross-examination. "It is difficult," says Mr. Taylor, "to see upon

what principle this rule is founded, where the complaint is offered as confirmatory evidence; because if witnesses were permitted to relate all that the prosecutrix had said in making her original complaint, such evidence would furnish the best test of the accuracy of her recollection, when she was sworn to describe the same circumstances at the trial." § 519. Under the above *illustrations* the *terms* of the complaint are admissible as original evidence.]

Facts necessary to explain or introduce relevant facts.

9. Facts necessary to explain or introduce a fact in issue or relevant fact, or which support or rebut an inference suggested by a fact in issue or relevant fact, or which establish the identity of any thing or person whose identity is relevant, or fix the time or place at which any fact in issue or relevant fact happened, or which show the relation of parties by whom any such fact was transacted, are relevant in so far as they are necessary for that purpose.

Illustrations.

(*a.*) The question is, whether a given document is the will of A.

The state of A's property and of his family at the date of the alleged will may be relevant facts.

(*b.*) A sues B for a libel imputing disgraceful conduct to A. B affirms that the matter alleged to be libellous is true.

The position and relations of the parties at the time when the libel was published may be relevant facts as introductory to the facts in issue.

The particulars of a dispute between A and B about a matter unconnected with the alleged libel are irrelevant, though the fact that there was a dispute may be relevant if it affected the relations between A and B.

(*c.*) A is accused of a crime.

The fact that, soon after the commission of the crime, A absconded from his house, is relevant, under section eight, as conduct subsequent to and affected by facts in issue.

The fact that, at the time when he left home, he had sudden and urgent business at the place to which he went, is relevant as tending to explain the fact that he left home suddenly.

The details of the business on which he left are not relevant, except in so far as they are necessary to show that the business was sudden and urgent.

[Declarations made or letters written during absence from home, explanatory of the motive of departure, are admissible as original evidence, since the departure and absence are very properly regarded as one continuing act.—Tay., § 526.]

(*d.*) A sues B for inducing C to break a contract of service made by him with A. C, on leaving A's service, says to A—'I am leaving you because B has made me a better offer.' This statement is a relevant fact as explanatory of C's conduct, which is relevant as a fact in issue.

[*Hadley* v. *Carter*, 8 New Hamps. 40.]

(*e.*) A, accused of theft, is seen to give the stolen property to B, who is seen to give it to A's wife. B says, as he delivers it—'A says you are to hide this.' B's statement is relevant as explanatory of a fact which is part of the transaction.

(*f.*) A is tried for a riot and is proved to have marched at the head of a mob. The cries of the mob are relevant as explanatory of the nature of the transaction.

[Lord George Gordon's Case. 21 How. State Trials, 514, 529.]

Things said or done by conspirator in reference to common design.

10. Where there is reasonable ground to believe that two or more persons have conspired together to commit an offence or an actionable wrong, anything said, done, or written by any one of such persons in reference to their common intention, after the time when such intention was first entertained by any one of them, is a relevant fact as against each of the persons believed to be so conspiring, as well for the purpose of proving the existence of the conspiracy as for the purpose of showing that any such person was a party to it.

Illustration.

(*a.*) Reasonable ground exists for believing that A has joined in a conspiracy to wage war against the Queen.

The facts that B procured arms in Europe for the purpose of the conspiracy, C collected money in Calcutta for a like object, D persuaded persons to join the conspiracy

in Bombay, E published writings advocating the object in view at Agra, and F transmitted from Delhi to G at Cabul the money which C had collected at Calcutta, and the contents of a letter written by H giving an account of the conspiracy, are each relevant, both to prove the existence of the conspiracy, and to prove A's complicity in it, although he may have been ignorant of all of them, and although the persons by whom they were done were strangers to him, and although they may have taken place before he joined the conspiracy or after he left it.

[In connection with the above section the following points should be clearly understood: 1*st*,—The section applies to the case either of an *offence* or of an *actionable wrong*, to joint conspirators and to co-trespassers or other *tort-feasors*. 2*nd*,—Before the evidence is admitted there must be *reasonable ground* to believe in the existence of a conspiracy. In England it has been usual occasionally for the sake of convenience to allow the acts or declarations of one conspirator to be given in evidence before sufficient proof has been given of the conspiracy, the prosecutor undertaking to furnish such proof at a later stage of the case. 3*rd*,—The connection of the individuals in the unlawful enterprise being shown, every act and declaration of each member of the confederacy is original evidence against every other member, though ignorant of them, and though the persons doing these acts or making those declarations may have been strangers to him. 4*th*,—Those acts and declarations are admissible as evidence though made *before* or *after* the connection with the enterprise of the individual against whom they are used. 5*th*,—A letter giving an account of the conspiracy is admissible, apparently, even though *not written in support of it or in furtherance of it.* This last rule is contrary to that followed in England. See the whole principle discussed.—Tay., §§ 526—534. See *The Queen* v. *Amírudín*, VII B. L. R., 63: and *The Queen* v. *Amír Khan and others*, IX B. L. R., 36.]

When facts not otherwise relevant become relevant.

11. Facts not otherwise relevant are relevant—

(1) if they are inconsistent with any fact in issue or relevant fact;

(2) if by themselves or in connection with other facts they make the existence or non-existence of any fact in issue or relevant fact highly probable or improbable.

Illustrations.

(*a*.) The question is, whether A committed a crime at Calcutta on a certain day.

The fact that on that day A was at Lahore is relevant.

The fact that near the time when the crime was committed, A was at a distance from the place where it was committed, which would render it highly improbable, though not impossible, that he committed it, is relevant.

(*b.*) The question is, whether A committed a crime.

The circumstances are such that the crime must have been committed either by A, B, C, or D. Every fact which shows that the crime could have been committed by no one else and that it was not committed by either B, C, or D, is relevant.

In suits for damages, facts tending to enable Court to determine amount are relevant.

12. In suits in which damages are claimed, any fact which will enable the Court to determine the amount of damages which ought to be awarded is relevant.

[As to character affecting damages, see Section 55, *post.*]

Facts relevant when right or custom is in question.

13. Where the question is as to the existence of any right or custom, the following facts are relevant—

(*a.*) Any transaction by which the right or custom in question was created, claimed, modified, recognized, asserted or denied, or which was inconsistent with its existence.

(*b.*) Particular instances in which the right or custom was claimed, recognized, or exercised, or in which its exercise was disputed, asserted or departed from.

Illustration.

The question is, whether A has a right to a fishery. A deed conferring the fishery on A's ancestors, a mortgage of the fishery by A's father, a subsequent grant of the fishery by A's father, irreconcilable with the mortgage, particular instances in which A's father exercised the right, or in which the exercise of the right was stopped by A's neighbours, are relevant facts.

[The *Illustration* shows that this section is intended to apply to *private* as well as *public* rights and customs.

Under English law, verdicts, judgments and other adjudications, although *inter alios*, are receivable in evidence to show the existence or non-existence of *customs of a public nature*. The admissibility of similar evidence in India for a similar purpose was recognized, before the passing of the Evidence Act, in the case of *Madhab Chandra Nath Bishwass* v. *Tomí Bewah and others* (VII W. R. Civ. Rul. 210). The Calcutta High Court here observed as follows :—

"Two instances were produced—one in the year 1852, and the other in the year 1862—in which the *right* was asserted and admitted to exist. These (judicial) proceedings are *good evidence in a matter of public interest*, such as the existence of a custom of this nature, and such a case forms a well-known exception to the usual rule which excludes *res inter alios actæ* (see Taylor on Evidence, Section 1496); and, had a large number of such instances been produced, there is no doubt whatever that the Judge would have been justified in his finding." See also as to local custom, *Sheik Kúdútúla* v. *Mohiní Mohun Saha and others*, V R. C. and C. R. 290: *Kesho Rai and others* v. *Binayak Rai and others*, IV N. W. P. Rep. 179 (Right of Pre-emption).

Similar evidence has usually been admitted in the Courts in India to prove *kuláchára* or family custom. See the case of *Nil Krishto Deb Barmano* v. *Bir Chandra Thakur and others* (Descent of the Tipperah Raj, before the Privy Council on the 15th March 1869, III B. L. R. Priv. Coun. 13); *Rawut Urjun Singh and Rawut Dúrjun Singh* v. *Rawut Ghunsiam Singh* (Raj of Rawatpúr, before the Privy Council on the 18th June 1851, V Moo. Ind. Ap. 169), and the cases collected at pp. 314—334 of Shamachurn Sirkar's *Vyavasthá Darpana*, or Digest of Hindú Law. Such a custom must be certain and intelligible (*Bhagawan Das* v. *Balgabind Singh*, I B. L. R. Short Notes ix.

As to *mercantile usage*, the Privy Council, in the case of *Jogo Mohun Ghose* v. *Manik Chand and Koisri Chand* (before the Privy Council on the 8th July 1859, Suth. Priv. Coun. Ap. 357), remarked as follows :—

"To support such a ground, there needs not either the antiquity, the uniformity, or the notoriety of custom, which in respect of all these becomes a local law. The usage may be still in its growth; it may require evidence for its support in each case; but in the result it is enough if it appear to be so well known and acquiesced in that it may be reasonably presumed to have been an ingredient tacitly imported by the parties into their contract."—See Proviso 5 to Section 92, *post*.

The mode of proving *custom* is important, as custom has in certain cases the force of law. Section 5, Act IV of 1872 expressly declares that the rule of decision for the Courts in the Panjáb shall be in part "any custom of any body or class of persons, which is not contrary to justice, equity, and good conscience, and has not been declared to be void by any competent authority; and Section 7 of the same Act validates all

local customs and mercantile usages unless they are contrary to justice, equity, and good conscience, or have been declared to be void by any competent authority. See also Section 6, Act VII of 1872 (The Burma Courts Act); and Section 1 of the Indian Contract Act, IX of 1872, which saves usages or customs of trade not inconsistent with the Act; and Section 110 of the same Act.

Section 2 of Bengal Regulation XI of 1825 enacts that, whenever any clear and definite usage as to alluvion and diluvion respecting the disjunction and junction of land by the encroachment or recess of a river, may have been *immemorially established* for determining the rights of the proprietors of two or more contiguous estates divided by a river, the usage so established shall govern the decision of all claims and disputes relative to alluvial land between the parties whose estates may be liable to such usage. Clause 5 Section 4 of the same Regulation enacts that in all cases of claims and disputes respecting land gained by alluvion or by dereliction of a river or of the sea, not specifically provided for by that Regulation, the Courts of Justice shall be guided by the best evidence they may be able to obtain of *established local usage*, if there be any applicable to the case, or if not, by general principles of equity and justice.

Custom is an unwritten law established by long usage and the consent of our ancestors. If it be universal, it is a part of the common law of the land: if particular, it is then properly a custom. The requisites to make a particular custom good under English law are: (*first*) it must have been used so long that the memory of man runs not to the contrary. The time of legal memory in England was by the Statute Westminster the First, 3, Edw. I, A.D. 1276, limited to the reign of Richard I, July 6, 1189; (*second*) it must have been continued; and (*third*) peaceable; and (*fourth*) reasonable; and (*fifth*) certain; and (*sixth*) compulsory, and not left to the option of every person, whether he will use it or not; and (*seventh*) consistent with other customs, for one custom cannot be set up in opposition to another. Whether all these requisites are necessary to make a good custom in India, has, I believe, never been decided; but there are many cases in which *reasonableness* and *certainty* have been insisted upon. As to what length of time will constitute the *immemoriality* of a custom, the following remarks of Grey, C. J., may be considered:—"Although in this country we cannot go back to that period which constitutes legal memory in England, *viz.*, the reign of Richard I., yet still there must be some limitation, without which a custom ought not to be held good. In regard to Calcutta, I should say that the Act of Parliament in 1773 which established this Supreme Court, is the period to which we must go back to found the existence of a valid custom, and that, after that date, there can be no subsequent custom, nor any change made in the general law of the

Hindoos, unless it be by some Regulation by the Governor-General in Council, which has been duly registered in this Court.[1] In regard to the Mofussil, we ought to go back to 1793. Prior to that, there was no registry of the Regulations, and the relics of them are extremely loose and uncertain.—*Clarke's Reports*, p 113.

The use of the word "right" in the above section will have the effect of making it very extensively applicable. There seems to be no reason why it should not apply to rights to all property, real and personal, immovable and movable. This section in the Bill as originally drafted was followed by these illustrations, *viz.* :—

"(*a.*) The question is, whether certain lands belong to A.

Transfers of the land from one person to another and finally to A are relevant facts.

(*b.*) The question is, whether a horse belongs to B, the executor of A, or to C, who is in possession of it.

The fact that A gave the horse to C in A's lifetime is relevant."

As to rights of way and other rights falling under the head of *Easements*, see Sections 27 and 28 of the Indian Limitation Act, IX of 1871, which will be found *in extenso*, *post*.

As to public and general rights and customs, see Clause 4, Section 32, and Section 48, *post*. See also in connection with this Section Clause 7, Section 32, *post*.]

Facts showing existence of state of mind or of body or bodily feeling.

14. Facts showing the existence of any state of mind—such as intention, knowledge, good faith, negligence, rashness, ill-will or good-will towards any particular person, or showing the existence of any state of body or bodily feeling—are relevant, when the existence of any such state of mind or body or bodily feeling is in issue or relevant.

[As to state of mind or body, see also Clause 2 of Section 21, *post*.]

Explanation.—A fact relevant as showing the existence of a relevant state of mind must show that it exists, not generally, but in reference to the particular matter in question.

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[1] The 13 Geo. III, Cap. LXIII, Section 36, required all laws made by the Governor-General and Council to be registered in the Supreme Court; but this provision was rescinded by the 3 & 4 Wm. IV, Cap. LXXXV, Section 45—[28th August 1833.]

Illustrations.

(*a.*) A is accused of receiving stolen goods knowing them to be stolen. It is proved that he was in possession of a particular stolen article.

The fact that at the same time he was in possession of many other stolen articles is relevant, as tending to show that he knew each and all of the articles of which he was in possession to be stolen.

[See Roscoe's Criminal Evidence, 6th Ed., p. 92.]

(*b.*) A is accused of fraudulently delivering to another person a piece of counterfeit coin which, at the time when he delivered it, he knew to be counterfeit.

The fact that, at the time of its delivery, A was possessed of a number of other pieces of counterfeit coin, is relevant.

[See Illustration (c) to Section 15, *post.*]

(*c.*) A sues B for damage done by a dog of B's, which B knew to be ferocious.

The facts that the dog had previously bitten X, Y, and Z, and that they had made complaints to B, are relevant.

[See *Thomas* v. *Morgan*, 2 C. M. and R. 496; *Kelly* v. *Wade*, 12 Ir. Law R. 424; *Cox* v. *Burbidge*, 13 Com. B. N. S. 430.]

(*d.*) The question is, whether A, the acceptor of a bill of exchange, knew that the name of the payee was fictitious.

The fact that A had accepted other bills drawn in the same manner before they could have been transmitted to him by the payee if the payee had been a real person, is relevant, as showing that A knew that the payee was a fictitious person.

(*e.*) A is accused of defaming B by publishing an imputation intended to harm the reputation of B.

The fact of previous publications by A respecting B, showing ill-will on the part of A towards B, is relevant, as proving A's intention to harm B's reputation by the particular publication in question.

[*Long* v. *Barrett*, 7 Ir. Law R. 439; and *Barrett* v. *Long*, 8 Ir. Law R. 331]

The facts that there was no previous quarrel between A and B, and that A repeated the matter complained of

as he heard it, are relevant, as showing that A did not intend to harm the reputation of B.

(*f.*) A is sued by B for fraudulently representing to B that C was solvent, whereby B, being induced to trust C, who was insolvent, suffered loss.

The fact that, at the time when A represented C to be solvent, C was supposed to be solvent by his neighbours and by persons dealing with him, is relevant, as showing that A made the representation in good faith.

[*Sheen* v. *Bumpstead;* 1 Hurlstone and Coltman's Rep. 358; and 2 New Rep. 370.]

(*g.*) A is sued by B for the price of work done by B, upon a house of which A is owner, by the order of C, a contractor.

A's defence is that B's contract was with C.

The fact that A paid C for the work in question is relevant, as proving that A did, in good faith, make over to C the management of the work in question, so that C was in a position to contract with B on C's own account, and not as agent for A.

[*Gerish* v. *Chartier*, 1 Com. B. 13.]

(*h.*) A is accused of the dishonest misappropriation of property which he had found, and the question is whether, when he appropriated it, he believed in good faith that the real owner could not be found

The fact that public notice of the loss of the property had been given in the place where A was, is relevant, as showing that A did not in good faith believe that the real owner of the property could not be found.

The fact that A knew, or had reason to believe, that the notice was given fraudulently by C, who had heard of the loss of the property and wished to set up a false claim to it, is relevant, as showing that the fact that A knew of the notice did not disprove A's good faith.

(*i.*) A is charged with shooting at B with intent to kill him. In order to show A's intent, the fact of A's having previously shot at B may be proved.

[*R.* v. *Voke*, R. & R. 531.]

(*j.*) A is charged with sending threatening letters to B. Threatening letters previously sent by A to B may be proved, as showing the intention of the letters.

[*R.* v. *Robinson*, 2 East. P. C. 1110, 1112.]

(*k.*) The question is, whether A has been guilty of cruelty towards B, his wife.

Expressions of their feeling towards each other shortly before or after the alleged cruelty are relevant facts.

(*l.*) The question is, whether A's death was caused from poison.

Statements made by A during his illness as to his symptoms, are relevant facts.

(*m.*) The question is, what was the state of A's health at the time when an assurance on his life was effected.

Statements made by A as to the state of his health at or near the time in question, are relevant facts.

[See *Aveson* v. *Lord Kinnaird*, 6 East., 188.]

(*n.*) A sues B for negligence in providing him with a carriage for hire not reasonably fit for use, whereby A was injured.

The fact that B's attention was drawn on other occasions to the defect of that particular carriage, is relevant.

The fact that B was habitually negligent about the carriages which he let to hire, is irrelevant.

(*o.*) A is tried for the murder of B by intentionally shooting him dead.

The fact that A, on other occasions, shot at B is relevant, as showing his intention to shoot B.

The fact that A was in the habit of shooting at people with intent to murder them, is irrelevant.

(*p.*) A is tried for a crime.

The fact that he said something indicating an intention to commit that particular crime, is relevant.

The fact that he said something indicating a general disposition to commit crimes of that class, is irrelevant.

Facts bearing on question whether act was accidental or intentional

15. When there is a question whether an act was accidental or intentional, the fact that such act formed part of a series of similar occurrences, in each of which the person doing the act was concerned, is relevant.

Illustrations.

(*a.*) A is accused of burning down his house in order to obtain money for which it is insured.

The facts that A lived in several houses successively, each of which he insured, in each of which a fire occurred, and after each of which fires A received payment from a different insurance office, are relevant, as tending to show that the fires were not accidental.

(*b.*) A is employed to receive money from the debtors of B. It is A's duty to make entries in a book showing the amounts received by him. He makes an entry showing that on a particular occasion he received less than he really did receive.

The question is, whether this false entry was accidental or intentional.

The facts that other entries made by A in the same book are false, and that the false entry is in each case in favour of A, are relevant.

(*c.*) A is accused of fraudulently delivering to B a counterfeit rupee.

The question is, whether the delivery of the rupee was accidental.

The facts that soon before or soon after the delivery to B, A delivered counterfeit rupees to C, D, and E, are relevant, as showing that the delivery to A was not accidental.

[See Tay. § 322 and Illustration (b) to Section 14, *ante.*]

Existence of course of business when relevant.

16. When there is a question whether a particular act was done, the existence of any course of business, according to which it naturally would have been done, is a relevant fact.

Illustrations.

(*a.*) The question is, whether a particular letter was despatched.

The facts that it was the ordinary course of business for all letters put in a certain place to be carried to the post, and that that particular letter was put in that place, are relevant.

(*b.*) The question is, whether a particular letter reached A. The facts that it was posted in due course, and was not returned through the Dead Letter Office, are relevant.

[In English law the matter of this Section has usually been dealt with as a *presumption*,—*i. e.*, the ordinary course of buisness was proved and the Court was asked to presume that on the particular occasion

in question there was no departure from the ordinary and general rule The following passage from Mr. Taylor's work will still further illustrate the principle.

"If letters or notices properly directed to a gentleman be left with his servant, it is only reasonable to presume, *primâ facie*, that they reached his hands. The fact, too, of sending a letter to the post-office will in general be regarded by a jury presumptively proved, if it be shown to have been handed to or left with the clerk whose duty it was in the ordinary course of business to carry letters to the post, and if he can declare that, although he has no recollection of the particular letter, he invariably took to the post-office all letters that either were delivered to him, or were deposited in a certain place for that purpose."

See also Section 114, and Illustration (*f*) thereto, *post*]

ADMISSIONS.

Admissions defined.

17. An admission is a statement, oral or documentary, which suggests any inference as to any fact in issue or relevant fact, and which is made by any of the persons, and under the circumstances, hereinafter mentioned.

["documentary"—For example, entries in account-books, &c. See the definition of "*document*" in Section 3, *ante*, page 74.]

Admission—by party to proceeding or his agent;

18. Statements made by a party to the proceeding, or by an agent to any such party, whom the Court regards under the circumstances of the case, as expressly or impliedly authorized by him to make them, are admissions.

["Where," says Mr. Justice Story, "the acts of the agent will bind the principal, there, his representations, declarations and admissions respecting the subject-matter will also bind him, if made at the same time and constituting part of the *res gestæ*. In a suit against a railroad company by a passenger for the loss of his trunk, the admissions of the conductor, baggage-master, or station-master, as to the manner of the loss, made the next morning in answer to enquiries for the trunk, are competent against the company, it being part of the duties of such agents to deliver the baggage of passengers, and to account for the same, if missing and enquiry is made within a reasonable time." (Story, Agency, § 134). The same learned writer remarks —"The representation,

declaration, or admission of the agent does not bind the principal, if it is not made at the very time of the contract, but upon another occasion; or if it does not concern the subject-matter of the contract, but some other matter, in no degree belonging to the *res gestæ*." (§ 135.)

The words of the section, "*whom the Court regards, under the circumstances of the case, as expressly or impliedly authorized by him to make them*," leave it open to the Courts to deal with each case as it arises upon its own merits. Mr. Story's observations, though not founded on precedents binding in India, may yet be valuable, as showing the principles generally applied in a country in which the decisions of the tribunals are not fettered by technicalities. These principles will be found clearly set forth in paras. 134 to 139a of Mr. Story's work on Agency, which may be usefully referred to. As a general rule, both in England and America, the admissions of an agent have been held binding on the principal only when they have been made during the continuance of the agency in regard to a transaction then depending, and when they have been within the scope of the agent's authority. The admissions of an agent cannot bind an infant, because an infant cannot appoint an agent.

Partners are agents for each other: "Whenever any number of persons are associated together in the joint prosecution of a common enterprise or design, as in commercial partnerships and similar cases, the act or declaration of each member in furtherance of the common object of the association is the act or declaration of all. By the very act of association each partner is constituted the agent of the others for all purposes within the scope of the partnership concern." (Taylor Ev., § 535, and see Story on Partnership, §§ 101—125.) There is, however, one case in which the admission of a partner cannot be used against his copartners. Section 20 of the Indian Limitation Act enacts (see Explanation 2) that a written promise or acknowledgment of a debt signed by one of several partners shall not render any of his copartners chargeable. See the section, which is given at length, *post*.

As to Agency and Partnership, see also Section 109, *post*.]

by suitor in representative character;

Statements made by parties to suits suing or sued in a representative character are not admissions, unless they were made while the party making them held that character.

[The following are instances of persons holding a representative character: the assignee of a bankrupt, an executor or administrator, the manager of a minor's property holding a certificate under Act XL of 1858. As to executors and administrators, see the Indian Succession Act, X of 1865, and the Hindu Wills Act, XXI of 1870.]

Statements made by—

by party interested in subject-matter,

(1) persons who have any proprietary or pecuniary interest in the subject-matter of the proceeding, and who make the statement in their character of persons so interested, or

by person from whom interest derived.

(2) persons from whom the parties to the suit have derived their interest in the subject-matter of the suit,

are admissions if they are made during the continuance of the interest of the persons making the statements.

[It has been decided in England and in America that the admissions of one partner, made *after* the dissolution of the partnership, *in regard to the business of the firm previously transacted*, are admissible as evidence against all the partners, *Loomis and Jackson* v. *Loomis*, 3 Deane's Reports of the Supreme Court of Vermont, 198; *Pritchard* v. *Draper*, 1 Russ. and Myl, 191, 199, 200. As the liability of each partner continues in respect of such transactions, his *interest* may be held to continue also.

The reason of the rule that admissions, in order to be relevant, must have been made *during the continuance of the interest* of the persons making them is this, that it would be inequitable to allow a person who has parted with his interest in property to divest the right of another claiming under him, by any statement which he may choose to make.

"*Derived their interest.*" It is not sufficient that the interest be *subsequent in point of time*: it must have been *derived from* the person who made the statement sought to be used as an admission. It has been held by the Calcutta High Court that the purchaser of an estate sold for arrears of revenue is not the privy in estate of the defaulting proprietor he does not derive his title from him and is bound neither by his acts nor his *laches* (*Munshi Buzlúl Rohoman* v. *Pran Dhan Dutt*, VIII W R, 222; *Goluk Máni Dasi* v. *Haro Chundra Ghose*, VIII W. R., 62). The purchasers of Patni taluks sold under Ben. Reg. VIII of 1819, and of under-tenures sold under Act VIII (B C) of 1865, acquire such taluks and tenures free of certain incumbrances (see S. 11 of the Reg and S. 16 of the Act). Such purchasers are not, however, in the favourable position of purchasers at a sale for arrears of Government revenue. How far they are privies with the previous holders of those tenures has not been definitively settled (see *Tara Persad Mitter* v. *Ram Nrisingh Mitter*, IV B L R., Ap 5.)

There is one rule relating to admissions which has not been embodied *totidem verbis* in the present Code, doubtless because it concerns the weight to be attached to this particular kind of evidence, a matter which is throughout left to the discretion and good sense of the Courts. This rule is that admissions are relevant only so far as the interests of the persons who made them or of those who claim through such persons are concerned. On this principle a distinction must be made between statements made by an occupier of land in disparagement of his own title, and statements which go to abridge or encumber the estate itself. For example, an admission by a *Patnidar* or other holder of a subordinate tenure will be good as against himself and those who derive their title from him, but it will not be relevant against the zemindar or other superior proprietor so as to encumber or diminish *his* rights.]

Admissions by persons whose position must be proved as against party to suit.

19. Statements made by persons whose position or liability it is necessary to prove as against any party to the suit, are admissions if such statements would be relevant as against such persons in relation to such position or liability in a suit brought by or against them, and if they are made whilst the person making them occupies such position or is subject to such liability.

Illustration.

A undertakes to collect rents for B.

B sues A for not collecting rent due from C to B.

A denies that rent was due from C to B.

A statement by C that he owed B rent is an admission, and is a relevant fact as against A, if A denies that C did owe rent to B.

[See Taylor, § 688. Another instance is the following:—A and B are jointly liable for a sum of money to C, who brings an action against A alone. A objects that he cannot singly or severally be made liable, and that B should be joined as a co-defendant, being jointly liable. An admission by B as to his joint liability is relevant between A and C.]

Admissions by persons xpressly referred to by Party to suit.

20. Statements made by persons to whom a party to the suit has expressly referred for information in reference to a matter in dispute are admissions.

Illustration.

The question is, whether a horse sold by A to B is sound.

A says to B—'Go and ask C, C knows all about it.' C's statement is an admission.

["In the application of this principle," says Mr. Taylor, "it matters not whether the question referred be one of law or of fact; whether the person to whom reference is made have or have not any peculiar knowledge on the subject; or whether the statements of the referee be adduced in evidence in an action on contract or in an action for tort. See the subject discussed.—Tay. §§ 689—693. There has been some conflict of decision in England as to whether the answer of the referee is conclusive against the party who makes the reference. Mr. Taylor observes that the purposes of justice and policy are sufficiently answered by throwing the burthen of proof on the opposing party, as in the case of an award, and by holding him bound unless he can impeach the test referred to by clear proof of fraud or mistake. In dealing with this question under the Code, the provisions of section 31, page 103, *post*, must be borne in mind.]

Relevancy of admissions against or in behalf of persons concerned.

21. Admissions are relevant and may be proved as against the person who makes them, or his representative in interest; but they cannot be proved by or on behalf of the person who makes them or by his representative in interest, except in the following cases:—

(1.) An admission may be proved by or on behalf of the person making it when it is of such a nature that, if the person making it were dead, it would be relevant as between third persons under section thirty-two.

(2.) An admission may be proved by or on behalf of the person making it when it consists of a statement of the existence of any state of mind or body, relevant or in issue, made at or about the time when such state of mind or body existed, and is accompanied by conduct rendering its falsehood improbable.

[As to state of mind or body, see also section 14, page 89, *ante*.]

(3.) An admission may be proved by or on behalf of the person making it if it is relevant otherwise than as an admission.

Illustrations.

(*a.*) The question between A and B is, whether a certain deed is or is not forged. A affirms that it is genuine; B that it is forged.

A may prove a statement by B that the deed is genuine, and B may prove a statement by A that the deed is forged; but A cannot prove a statement by himself that the deed is genuine, nor can B prove a statement by himself that the deed is forged.

(*b.*) A, the Captain of a ship, is tried for casting her away.

Evidence is given to show that the ship was taken out of her proper course.

A produces a book kept by him in the ordinary course of his business, showing observations alleged to have been taken by him from day to day, and indicating that the ship was not taken out of her proper course. A may prove these statements, because they would be admissible between third parties if he were dead, under section thirty-two, clause (two).

(*c.*) A is accused of a crime committed by him at Calcutta.

He produces a letter written by himself and dated at Lahore on that day and bearing the Lahore post-mark of that day.

The statement in the date of the letter is admissible, because, if A were dead it would be admissible under section thirty-two, clause (two).

(*d.*) A is accused of receiving stolen goods knowing them to be stolen.

He offers to prove that he refused to sell them below their value.

A may prove these statements, though they are admissions, because they are explanatory of conduct influenced by facts in issue.

(*e.*) A is accused of fraudulently having in his possession counterfeit coin which he knew to be counterfeit.

He offers to prove that he asked a skilful person to examine the coin, as he doubted whether it was counterfeit or not, and that that person did examine it and told him it was genuine.

A may prove these facts for the reasons stated in the last preceding illustration.

[With reference to the third clause of this section an admission may be provable on behalf of the person making it by being relevant (otherwise than as an admission) under section 6 or some one of the sections following it. In addition to Illustrations (*d*) and (*e*) the following may also be given :—

A sues B for falsely representing the solvency of C, in consequence of which A was induced to supply C with goods on credit. A statement made by A at the time, that he trusted C in consequence of B's representation, is admissible on behalf of A under *Explanation* I, Section 8 (*Fellowes* v. *Williamson*, M and M, 306).

A, the captain of a ship about to sail on a voyage, carefully examines the ship, declares his belief that she is sea-worthy, and embarks on her with his family and property uninsured. The ship is lost. In an action by the owners on a policy of insurance of the ship and cargo, it is pleaded that the ship was not sea-worthy when leaving port. A's statement is admissible under clause 2, section 11, *ante*.]

When oral admissions as to contents of documents are relevant.

22. Oral admissions as to the contents of a document are not relevant, unless and until the party proposing to prove them shows that he is entitled to give secondary evidence of the contents of such document under the rules hereinafter contained, or unless the genuineness of a document produced is in question.

[For the rules regulating the admission of secondary evidence of documents, see section 65, *post*.

The rule here laid down is contrary to that propounded in *Slatterie* v. *Pooley* 6 Mee. and W. 669, in which it was decided that evidence of the parol admissions of a party as to the contents of a document is admissible "without notice to produce or accounting for the absence of the written instrument, on the ground that such evidence is not open to the same objection which belongs to parol evidence from other sources, where the written evidence might have been produced; for such evidence is excluded from the presumption of its untruth, arising from the very nature of the case, where better evidence is withheld; whereas, what a party himself admits to be true, may reasonably be presumed to be so." This decision was severely criticised. It was remarked that, according to the rule so laid down, what A states as to what B, a party, has said respecting the contents of a document which B has seen, is admissible, whilst what A states, respecting a document which he himself has seen, is not admissible,—although in the latter case the chance of error is single; in the former, double. And in an

Irish case (*Lawless* v. *Queale*, 8 Ir. Law. Rep. 382) Pennefather, C. J., said:—"The doctrine laid down in that case is a most dangerous proposition; by it a man might be deprived of an estate of £10,000 per annum derived from his ancestors through regular family deeds and conveyances, by producing a witness, or by one or two conspirators, who might be got to swear that they heard defendant say he had conveyed away his interest therein by deed, or had mortgaged or had otherwise encumbered it: and thus, by the facility so given, the widest door would be opened to fraud, and a man might be stripped of his estate through this invitation to fraud and dishonesty."]

Admissions in civil cases when relevant.

23 In civil cases no admission is relevant, if it is made either upon an express condition that evidence of it is not to be given, or under circumstances from which the Court can infer that the parties agreed together that evidence of it should not be given.

Explanation.—Nothing in this section shall be taken to exempt any barrister, pleader, attorney, or vakíl from giving evidence of any matter of which he may be compelled to give evidence under section 126.

[This section, as drafted in the original Bill, contained "infer that *it was the intention of the parties* that evidence of it should not be given," for "infer that the parties agreed together that," &c.

In the absence of any such express agreement, or implied condition, an offer of compromise will be *some* evidence of liability: but it must be borne in mind that such an offer may be made for the sake of purchasing peace, and without any admission of liability. Much will depend upon the circumstances of each case.

In English Law the term "admission" is usually applied to Civil transactions and employed in *civil cases;* while the term "confession" is confined to acknowledgments of guilt and to *criminal cases.* This distinction has been generally adopted in the Code; but the provisions of sections 17—22 are none the less applicable to criminal cases also]

Confession caused by inducement, threat, or promise, irrelevant.

24. A confession made by an accused person is irrelevant in a criminal proceeding, if the making of the confession appears to the Court to have been caused by any inducement, threat, or

promise, having reference to the charge against the accused person, proceeding from a person in authority and sufficient, in the opinion of the Court, to give the accused person grounds, which would appear to him reasonable, for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him.

Confession made to a Police officer not to be used as evidence.

25. No confession made to a Police officer shall be proved as against a person accused of any offence.

Confession made by accused while in custody of Police not to be used as evidence.

26. No confession made by any person whilst he is in the custody of a Police officer, unless it be made in the immediate presence of a Magistrate, shall be proved as against such person.

So much of statement or confession made by accused as relates to fact thereby discovered, may be proved.

27. Provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a Police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved.

[Section 150 of the old Code of Criminal Procedure, Act XXV of 1861, ran thus—"deposed to *by a Police Officer*," &c. The words in italics were omitted in the amended section substituted by Act VIII of 1869; and the omission has been here retained. As the section stands, the fact may be deposed to by any one.]

Confession made after removal of impression caused by inducement, threat, or promise, relevant.

28. If such a confession as is referred to in section twenty-four is made after the impression caused by any such inducement, threat, or promise, has, in the opinion of the Court, been fully removed, it is relevant.

Confession otherwise relevant not to become irrelevant because of promise of secrecy, &c.

29. If such a confession is otherwise relevant, it does not become irrelevant merely because it was made under a promise of secrecy, or in consequence of a deception practised on the accused person for the purpose of obtaining it, or when he was drunk, or because it was made in answer to questions which he need not have answered, whatever may have been the form of those questions, or because he was not warned that he was not bound to make such confession, and that evidence of it might be given against him.

Consideration of proved confession affecting person making it and others jointly under trial for same offence.

30. When more persons than one are being tried jointly for the same offence, and a confession made by one of such persons affecting himself and some other of such persons is proved, the Court may take into consideration such confession as against such other person as well as against the person who makes such confession.

Illustrations.

(*a.*) A and B are jointly tried for the murder of C. It is proved that A said,—" B and I murdered C." The Court may consider the effect of this confession as against B.

(*b.*) A is on his trial for the murder of C. There is evidence to show that C was murdered by A and B, and that B said,—" A and I murdered C."

This statement may not be taken into consideration by the Court against A, as B is not being jointly tried.

With the above sections must be read the sections (see *post*) of the Code of Criminal Procedure, Act X of 1872, which contain further provisions as to confessions, and under which will be found a general exposition of the whole law relating to this subject.]

Admissions not conclusive proof but may estop.

31. Admissions are not conclusive proof of the matters admitted, but they may operate as estoppels under the provisions hereinafter contained.

[In the following cases, which may be advantageously studied, admissions were held not to have the force of estoppels:—*Mussamat Lado*

v. *Mussamat Udey Kunwar*, I N.-W.P. Rep. Full Bench, 23: *Ram Sarun Singh and others* v. *Mussamut Pran Piyári and others* (I W. R. Civil Rulings, 156). Here it was held that where, in an answer to a suit, two parties combine to make a statement to defeat a third party, it is competent to either of those parties, when they are *opposed to each other* in a subsequent suit, to say that the combined statement was false, and intended as a fraud against the third party; the admission in the former suit not having the effect of an estoppel against either of the parties to the second suit (*Chandra Kant Chakravartti Christian* v. *Piyári Mohun Dutt and others*, V W. R. Civ. Rul. 209). In this case the question was whether the plaintiff or his mother was the real owner of certain lands. The plaintiff had in several cases admitted that his mother was the owner, and in two suits brought by her for rent in which she based her right to sue upon purchase from him, he had acted as her *mukhtar* and signed her name by procuration. The lands were brought to sale in execution of a decree against her. In a suit by the plaintiff to recover them on the ground that he had only mortgaged them to his mother, and that the mortgage-debt had been paid off, it was held that these admissions were evidence against the plaintiff; although they did not amount to an estoppel, inasmuch as they had not been made to the purchaser or any one concerned, and there was no proof that these parties ever heard of them, or were in any way misled by them or had made their purchase in reliance on them.

Where admissions are contained in statements filed in a Court of Justice, more especially if filed on behalf of a *purda nishin* female, it should be shown that they emanated from the person against whom it is sought to use them, or from some one duly authorized to make them on his behalf. *Asmatunissa Bibi* v. *Alla Hafiz and others*, VIII W. R. Civ. Rul. 468; *Unda Bibi* v. *Syud Shah Jonab Ali*, V W. R. Civ. Rul. 132; *Gur Persad* v. *Nanda Singh*, I. N.-W. P. Rep. 160 (Admission before registering officer of receipt of consideration for a conveyance); *Nand Kishor* v. *Nathu Ram*, I N.-W. P. 223 (Contribution of share of profit and signing the *Patwari's* book as *lumberdar*); *Forbes* v. *Mir Mahomed Taki*, before the Privy Council on 26th July, 1870, V B. L. R. 529 (Admission though not regarded as an estoppel, held to cast upon party who made it the burden of explaining it); *Chaudhri Debi Persad* v. *Chaudhri Daulat Singh*, before the Privy Council on the 13th December, 1844, III Moo. In. Ap. 347, Suth. Priv. Coun. Ap. 161 (Recital of receipt of consideration in a deed of compromise).

As to estoppels, see sections 115–117, *post*.

In connection with the present subject, it may be mentioned that the acknowledgment of a child as being the son of the acknowledger, when the ages of the parties admit of the party acknowledged being the son of the acknowledger, and where the descent of the person acknowledged

has not been already established from another, according to Mahomedan law, amounts not merely to *primâ facie* evidence which may be rebutted, but establishes the fact acknowledged. *In the matter of the petition of Mussamat Bibi Najibunissa* (IV B. L. R. Civ. Ap. 55, and Baillie's Digest of Mahomedan Law, p. 403).

The whole statement containing an admission ought to be taken together; for though some part of it may be favourable to the party, and the object is only to ascertain what he has conceded against himself, and what may therefore be presumed to be true: yet, unless the whole is received, the true meaning of the part which is evidence against him cannot be ascertained. (See in connection with this point section 39, *post.*) This applies equally to written as to verbal admissions. But though the whole of the statement made at the same time, and relating to the same subject, must be given in evidence, it does not follow that all the parts of such statement should be regarded as equally deserving of credit; but the jury or the Court must consider, under the circumstances, how much of the entire statement they deem worthy of belief, including as well the facts asserted by the party in his own favour, as those making against him. Taylor, §§ 655, 656. *Rájá Nilmani Singh Deo* v. *Ramanagrah Rai and others*, VII W. R. Civ. Rul. 29: *Radha Churn Chowdhry* v. *Chandra Mani Sikdar and others*, IX W. R. Civ. Rul. 290: *Pálin Behari Sen* v. *Watson and Co.* (*Full Bench*), IX W. R. Civ. Rul. 190: *Beikanth Nath Khamar* v. *Chandra Mohun Chaudhri*, I B. L. Rep. A. C. 133. The principal established by the last two cases is that if a man makes a qualified statement, that statement cannot be used against him apart from the qualification. If a man, however, make a series of independent unqualified statements, there is nothing to prevent such statements being used separately. In the case of *Beikanth Nath Khamar* the plaintiff sued to recover possession of certain ancestral *jummai* lands, from which he alleged that he had been dispossessed by the defendant. The defendant in his written statement alleged that the plaintiff's ancestor had relinquished the lands; that the zemindar having thus acquired a right to them had leased them to him; that he had been since in possession, and that he had not dispossessed the plaintiff. It was observed that there were two distinct statements of facts made by the defendant—*first*, that the plaintiff's ancestor held the tenure and was in possession up to a certain date; *second*, that on that date the plaintiff's ancestor relinquished the lands, a settlement of which was therefore made with the defendant; that in what was said as to relinquishment and subsequent settlement, there was no qualification whatever of the statement and admission by the defendant, that the plaintiff's ancestor held the tenure for a certain time. It was, therefore, decided that the defendant having admitted the plaintiff's (ancestor's) possession, it lay on him to prove the relinquishment: and, he not having done so, that

the plaintiff was entitled to succeed In several of the cases above referred to, the admissions were made in the written statements of the parties, filed in the case under trial. The provisions of the Indian Evidence Act are not restricted to admissions made at any particular time or place, and are wide enough to include admissions made in pleading. The rules of pleading in the Courts in India are widely different from the rules in Courts in England: and in connection with the present subject one point of difference may here be noticed.

There is a rule in English Courts of Law, that *whenever a material averment well pleaded is passed over by the adverse party without denial, it is thereby conclusively admitted.* As to the applicability of this rule to India, the following remarks in the case of *Anund Moyi Chraudhrain* v. *Sib Chandra Rai* (before the Privy Council, on the 19th July, 1862) deserve notice: "Their Lordships cannot apply to the pleadings in these Courts the strict rule, that averments not traversed must be taken to be admitted; and they are not prepared to say that the answer contains an admission which, even as between the plaintiff and Haro Mani, would have dispensed with the necessity of proving the instrument." (II W. R. Privy Council Decisions, p. 19—21, and Suth. Priv. Coun. Ap. 485. See also *Sadhú Singh and others* v. *Ramanu Graha Lall and others*, IX W. R. Civ. Rul. 83.) A written statement is not a pleading in confession and avoidance, by which the defendant is bound by the confession and so compelled to prove the avoidance. If used against him, as it may be used, the whole statement must be taken together (*Sultan Ali* v. *Chand Bibi and others*, IX W. R. Civ. Rul. 130; *Pulin Behari Sen* v. *Watson and Co.*, IX W. R. Civ. Rul. 190. See in connection with this point section 58, *post*).

An infant cannot appoint an agent. Therefore the admissions of an agent acting for an infant will not bind the infant. But admissions made by an infant, while under age, may be proved against him in an action brought against him after obtaining his majority for goods supplied to him during his minority (*O'Neill* v. *Read*, 7 Ir. Law Rep. 434). Such admissions might relate to the receipt of the goods or to other matters, but would not, of course, affect the question of liability in cases in which a minor would not be liable on a contract unless such contract were ratified by him after obtaining his majority. (See section 11 of the Indian Contract Act, IX of 1872, as to incompetency to contract by reason of non-age).

Admissions by *conduct* are treated of by English text-writers under the general head of admissions. For example, the suppression of documents is an admission that their contents are unfavourable to the party suppressing them: the entry of a charge to a particular person in a tradesman's book is an admission that the goods were furnished on his credit; payment of money is an admission against the payer, that the

receiver is the proper person to receive it.[1] The original draft of the Evidence Act contained the following section:—

Admissions by conduct.

"The conduct of any party to any proceeding upon the occasion of anything being done or said in his presence in relation to matters in question, and the things so said or done, are relevant facts, when they render probable or improbable any relevant fact alleged or denied in respect of the person so conducting himself."

The provisions of this proposed section are, however, incorporated in other parts of the existing Act. See Illustrations *(f)*, *(g)*, *(h)*, and *(i)* to section 8, section 11 and Illustrations *(g)*, and *(h)* to section 114.]

STATEMENTS BY PERSONS WHO CANNOT BE CALLED AS WITNESSES.

Cases in which statement of relevant fact by person who is dead or cannot be found, &c., is relevant.

32. Statements, written or verbal, of relevant facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which, under the circumstances of the case, appears to the Court unreasonable, are themselves relevant facts in the following cases:—

When it relates to cause of death;

(1.) When the statement is made by a person, as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question.

Such statements are relevant whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question.

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[1] But not against the receiver that the payer was the person who was bound to pay it, for the party receiving payment of a just demand may well assume without inquiry that the party tendering the money was the person legally bound to pay it.

(2.) When the statement was made by such person in the ordinary course of business, and in particular when it consists of any entry or memorandum made by him in books kept in the ordinary course of business, or in the discharge of professional duty; or of an acknowledgment written or signed by him of the receipt of money, goods, securities or property of any kind; or of a document used in commerce written or signed by him or of the date of a letter or other document usually dated, written or signed by him.

or is made in course of business;

(3.) When the statement is against the pecuniary or proprietary interest of the person making it, or when, if true, it would expose him or would have exposed him to a criminal prosecution or to a suit for damages.

or against interest of maker;

(4.) When the statement gives the opinion of any such person, as to the existence of any public right or custom or matter of public or general interest, of the existence of which, if it existed, he would have been likely to be aware, and when such statement was made before any controversy as to such right, custom or matter had arisen.

or gives opinion as to public right or custom or matters of general interest;

(5.) When the statement relates to the existence of any relationship [by blood, marriage, or adoption[1]] between persons as to whose relationship the person making the statement had special means of knowledge, and when the statement was made before the question in dispute was raised.

or relates to existence of relationship;

(6.) When the statement relates to the existence of any relationship [by blood, marriage, or adoption[1]] between persons deceased, and is made in

or is made in will or deed of deceased person;

[1] The words in brackets were added by the amending Act, XVIII of 1872.

any will or deed relating to the affairs of the family to which any such deceased person belonged, or in any family pedigree, or upon any tombstone, family portrait or other thing on which such statements are usually made, and when such statement was made before the question in dispute was raised.

or relates to transaction mentioned in section 13, clause (*a*);

(7.) When the statement is contained in any deed, will, or other document which relates to any such transaction as is mentioned in section thirteen, clause (*a*).

or is made by several persons, and expresses feelings relevant to matter in question.

(8.) When the statement was made by a number of persons, and expressed feelings or impressions on their part relevant to the matter in question.

Illustrations.

(*a.*) The question is, whether A was murdered by B; or A dies of injuries received in a transaction in the course of which she was ravished. The question is whether she was ravished by B: or

The question is, whether A was killed by B under such circumstances that a suit would lie against B by A's widow.

Statements made by A as to the cause of his or her death, referring respectively to the murder, the rape, and the actionable wrong under consideration, are relevant facts.

(*b.*) The question is as to the date of A's birth.

An entry in the diary of a deceased surgeon, regularly kept in the course of business, stating that, on a given day, he attended A's mother and delivered her of a son, is a relevant fact.

(*c.*) The question is, whether A was in Calcutta on a given day.

A statement in the diary of deceased solicitor, regularly kept in the course of business, that, on a given day, the solicitor attended A at a place mentioned in Calcutta for the purpose of conferring with him upon specified business, is a relevant fact.

(*d.*) The question is, whether a ship sailed from Bombay harbour on a given day.

A letter written by a deceased member of a merchant's firm, by which she was chartered, to their correspondents in London to whom the cargo was consigned, stating that the ship sailed on a given day from Bombay harbour, is a relevant fact.

(*e.*) The question is, whether rent was paid to A for certain land.

A letter from A's deceased agent to A saying that he had received the rent on A's account and held it at A's orders, is a relevant fact.

(*f.*) The question is, whether A and B were legally married.

The statement of a deceased clergyman that he married them under such circumstances that the celebration would be a crime, is relevant.

(*g.*) The question is, whether A, a person who cannot be found, wrote a letter on a certain day. The fact that a letter written by him is dated on that day, is relevant.

(*h.*) The question is, what was the cause of the wreck of a ship.

A protest made by the captain, whose attendance cannot be procured, is a relevant fact.

(*i.*) The question is whether a given road is a public way.

A statement by A, a deceased headman of the village, that the road was public, is a relevant fact.

(*j.*) The question is, what was the price of grain on a certain day in a particular market. A statement of the price made by a deceased bánya in the ordinary course of his business, is a relevant fact.

(*k.*) The question is, whether A, who is dead, was the father of B.

A statement by A that B was his son, is a relevant fact.

(*l.*) The question is, what was the date of the birth of A.

A letter from A's deceased father to a friend, announcing the birth of A on a given day, is a relevant fact.

(*m.*) The question is, whether, and when, A and B were married.

An entry in a memorandum book by C, the deceased father of B, of his daughter's marriage with A at a given date, is a relevant fact.

(*n.*) A sues B for a libel expressed in a painted caricature exposed in a shop window. The question is as to the similarity of the caricature and its libellous character. The remarks of a crowd of spectators on these points may be proved.

[This is a most important section; and the student, who would comprehend its full scope and meaning, will have to study it carefully. As a general rule, oral evidence must be direct (see section 60, *post*): in other words, if it refers to a fact which could be seen, it must be the evidence of a witness, who says he saw it; if it refers to a fact which could be heard, it must be the evidence of a witness who says he heard it; if it refers to a fact which could be perceived by any other sense or in any other manner, it must be the evidence of a witness who says he perceived it by that sense or in that manner. It may happen, however, that a witness, who, if present before the Court, could give this direct evidence, is dead, or cannot be found, or has become incapable of giving evidence in consequence of physical or mental injury or disease; or it may be that his attendance cannot be procured without an amount of delay or expense, which, having regard to the circumstances of the case, it would be unreasonable to incur: and it may also be that this witness has made a statement, *either written or verbal*, with reference to the fact (which must be a *relevant* fact) under such circumstances that the truth of this statement may reasonably be presumed. The law here dispenses with direct oral evidence of the fact and with the safeguards for truth provided by cross-examination and the sanctity of an oath, and allows the statement to become evidence, the probability of its being a true statement depending upon other safeguards, which will be noticed in connection with each exception to the general rule, for the eight cases provided for by the eight paragraphs of this section may in some sort be regarded as exceptions to the general rule that oral evidence must be direct. They are, in fact, treated by English text-writers as exceptions to the rule that hearsay evidence is inadmissible; but it will be remembered that the phrase "hearsay evidence" is excluded from the Code. The Select Committee in their First Report say, "The phrase 'hearsay evidence,' which is used by English writers "in so vague and unsatisfactory a manner, finds no place in our draft, "and we hope we have avoided the possibility of any confusion in con-"nection with it. Chapter II provides specifically, and in a manner "which corresponds on the whole (though with some modifications) with "the English law, in what cases the statements and opinions of third "persons as to relevant facts shall, and in what cases they shall not, be "themselves relevant; and Chapter V, on *Proof by Oral Evidence*, "provides that oral evidence shall in all cases be direct, on whatever "ground the fact which it is to establish may be relevant to the issue; "that is to say, if the fact is one which could be seen, it must be estab-"lished by a witness who says he saw it; if it could be heard, by a "witness who says he heard it, whether it is a fact in issue or a collateral "fact. These provisions distribute the different things described by "the phrase 'hearsay evidence." The case stands thus, therefore. English

writers start by laying down the general rule that "hearsay is no evidence," and then proceed to state the exceptions to this rule, amid the number and intricacy of which the rule itself is too often lost sight of. The Indian Code, on the other hand, while laying down as a general rule that oral evidence must be direct, embodies what might appear to be the exceptions to this rule in separate and distinct rules, regarding the subject-matter of these supplementary rules from an independent stand-point of view afforded by the idea of "relevancy." If this difference in the mode of treating the subject be carefully borne in mind, the following exposition of the section (which follows the order of the section itself) will be the more readily and clearly understood.

Statements as to Cause of Death, &c.

I. Dying statements are relevant and admissible, *whether made in the presence of the accused person or not.* This was laid down in so many words in the old Code of Criminal Procedure (section 371, Act XXV of 1861). The words in italics are not, however, necessary to convey the absence of any such restriction as that indicated by them. The reason of the admission of this kind of evidence is thus stated by Lord Chief Baron Eyre: "They are declarations made in extremity, when the party is at the point of death, and when every hope of this world is gone, when every motive to falsehood is silenced, and the mind is induced by the most powerful considerations to speak the truth: a situation so solemn and so awful is considered by the law as creating an obligation equal to that which is imposed by a positive oath in a Court of Justice." "At one time," says Mr. Taylor, "an opinion prevailed that this general principle warranted the admission of dying declarations in all cases, civil and criminal; and it was expressly held by respectable authorities, that the dying declarations of a subscribing witness to a forged instrument were admissible to impeach it. A contrary doctrine, however, has since prevailed, and *it is now settled law, both in England and America that evidence of this description is admissible in no civil case; and, in criminal cases, only in the single instance of homicide, where the death of the deceased is the subject of the charge, and the circumstances of the death are the subject of the dying declaration.* Thus, on a trial for robbery, the dying delaration of the party robbed has been rejected: and, where a prisoner was indicted for administering drugs to a woman with intent to procure abortion, her statements *in extremis* were held to be inadmissible ..... In Ireland, on an indictment for murder, the prisoner was not allowed to avail himself of the statement of a stranger, who on his death-bed confessed that he had committed the crime." Mr. Taylor gives three reasons for restricting the application of the principle to cases of homicide,—*first*, the danger of perjury in fabricating declarations, the truth or falsehood of which

t is impossible to ascertain; *secondly*, the danger of letting in incomplete statements, which, though true as far as they go, do not constitute the whole truth; and, *thirdly*, the experienced fact that implicit reliance cannot in all cases be placed upon the declarations of a dying person: for his body may have survived the powers of his mind; or his recollection, if his senses are not impaired, may not be perfect; or, for the sake of ease, and to be rid of the importunity of those around him, he may say or seem to say whatever they chose to suggest. These considerations would be well borne in mind when estimating the weight to be allowed to dying statements in particular cases, but they have never been regarded in India as a sufficient argument for the exclusion of this kind of evidence in all other cases than those of homicide. The law on this subject was formerly contained in section 371 of Act XXV of 1861 and section 29 of Act II of 1855; and it was decided under these sections that the rule of English law restricting the admission to cases of homicide has no application in India (*The Queen* v. *Bissorunjun Mukerji*, VI W. R. Crim. Rul. 75). It was here remarked that the law of England on the subject has been much narrowed of late years, and that there are instances in the older books in which dying declarations had been admitted even in civil cases. The Indian Code is now clear that such statements are relevant, *whatever may be the nature of the proceeding;* and Illustration (*a*) gives an example of a civil as well as of a criminal case. This evidence is not, however, admissible in all civil and criminal cases indiscriminately, *but only in those cases in which the cause of the death of the person, who made the statement, comes in question;* and, further, the statement, in order to be relevant, must have reference to *the cause of that person's death or to some of the circumstances of the transaction which resulted in his death.*

There is another important point of distinction between the law as laid down in the Indian Evidence Act, and the law as administered in England; and, indeed, I may add as previously administered in India. According to English law, the declarant must have been in *actual danger of death* and must have had *full apprehension of his danger.*

With respect to this belief of impending death, Mr. Taylor observes: "*It is not necessary that the declarant should have stated* that he was speaking under a sense of impending death, provided it satisfactorily appears, in any mode, that the declarations were really made under that sanction: as, for instance, if the fact can be reasonably inferred from the evident danger of the declarant, or from the opinions of the medical or other attendants stated to him, or from his conduct, such as settling his affairs, taking leave of his relations and friends, giving directions respecting his funeral, receiving extreme unction, or the like. In short, all the circumstances of the case may be resorted to in order to ascertain the state of the declarant's mind." Under the Indian Evidence Act the statement is relevant, *whether the person who made it was or was not at*

the time when it was made under expectation of death. Whether the declarant was or was not in actual danger of death, and knew or did not know himself to be in such danger, are therefore considerations which will no longer affect the *admissibility* of this kind of evidence in India; but these considerations ought not to be laid aside in estimating the *weight* to be allowed to the evidence in particular cases. The statement is not admissible under English law, unless the death of the person who made it have ensued. Under the Indian Evidence Act the same rule will prevail, inasmuch as the statement is admissible only in cases in which the cause of the *death* of the person who made it comes in question. It cannot, therefore, be admissible until he be dead.[1]

Before, however, the statement is admitted, proof must be given that the person who made it is *dead*, and the burden of proving this is on the person who wishes to give the statement in evidence; see section 104, *post.* Where a Judge is sitting with a Jury, the admissibility of this evidence in any particular case is a question to be decided by the Judge alone; see section 256 of the Code of Criminal Procedure (Act X of 1872), and the authorities collected in Mr. Taylor's work, § 22, Note. The statement will, of course, be admissible only if the person who made it being present would be allowed to make the same statement in the witness-box. For example, it would not be admissible if made by a person whom the Court, under the provisions of section 118, *post*, considered incompetent to testify.

It frequently happens in India that a Magistrate is called upon to take down the statement of a person who has been brought from the interior of a district to head-quarters severely injured, or, it may be, in a moribund state. Where the circumstances of the case permit, the statement should be taken in the presence of the accused, and should be written as a formal deposition in accordance with the provisions of Chapter XXV of the Code of Criminal Procedure, Act X of 1872. If this be done, and the injured person die or become incapable of giving evidence at the Sessions, the deposition so taken will be admissible in evidence without further proof; see the explanation to section 33, *post*, also section 80, *post;* and read these portions of the law in connection with section 249 of the Code of Criminal Procedure, which is as follows:—

Evidence given at the preliminary inquiry admissible.

"When a witness is produced before the Court of Session, or High Court, the evidence given by him before the committing Magistrate may be referred to by the Court if it was duly taken in the presence of the accused person, and the Court may, if it think fit, ground its judgment thereon, although the witnesses may at the trial make statements inconsistent therewith.

[1] It may be observed that the words "or who cannot be found or who has become incapable of giving evidence, or whose attendance cannot," &c., in the first part of the section, have no application in connection with this first paragraph.

EXPLANATION.—This section shall not authorize the Court to refer to the record of the evidence given by a witness who is absent, except in the cases in which such evidence may be referred to under the Indian Evidence Act or other law in force for the time being upon the subject of evidence."

If the statement be not taken down in the presence of the accused and as a formal deposition, there seems to be nothing in the law to render it admissible in consequence of its having been taken down by a Magistrate without its being proved in the ordinary way. It ought to be, as far as possible, complete in itself; for if the dying man appears to have intended to qualify it by other statements, which he is prevented by any cause from making, its value as evidence will be materially affected. The statement is admissible as well for the accused as for the prosecutor.

A police officer is competent to give evidence of a dying declaration made in his presence; see the proviso to section 121 of the Code of Criminal Procedure.

The caution with which this kind of testimony should be received has often been commented upon. The test of cross-examination may be wholly wanting; and, as remarked by Mr. Philips, the particulars of the violence may have occurred under circumstances of confusion and surprise, calculated to prevent their being accurately observed. The consequences also of the violence may occasion an injury to the mind and an indistinctness of memory as to the particular transaction. The deceased may have stated his *inferences* from facts, concerning which he may have drawn a wrong conclusion, or he may have omitted important particulars, from not having his attention called to them. Any one who has ever taken down the statement of an illiterate man, suffering from severe injuries, will fully realize the truth of these remarks. The mind, at no time very competent to draw a clear distinction between ideas obtained through the medium of its own senses, and that which has been heard or imagined, is less than ever able to discriminate when distracted and enfeebled by physical suffering. Falsehood must also be guarded against, and this more especially in India. I have, in the course of my experience, met several cases which strongly impressed me with the necessity of exercising the greatest possible care and discrimination in estimating the value to be assigned to this kind of evidence; and in more than one instance I have known a statement made by a person who did not expect to live many hours, turn out to be wholly and utterly untrue.[1] "Where a witness," says Mr. Taylor, "has not a deep sense

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[1] The following case came before me very recently. A women had two sons who married B and C respectively. The sons were from home on business which detained them a couple of months away, the three women remaining alone. The brother of the headman of the village, who was also a relation, tried to seduce C in

of accountability to his Maker, feelings of anger or revenge, or, in the case of mutual conflict, the natural desire of screening his own misconduct, may affect the accuracy of his statements, and give a false colouring to the whole transaction." In a country in which the passion of revenge is one of the most remarkable features in the character of the inhabitants, these remarks have a special applicability.

Statements made in course of business. Para. 2.

II. Statements, written or verbal, of relevant facts, made in the ordinary course of business by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an unreasonable amount of delay or expense, are relevant. The considerations which have induced the Courts to admit this kind of evidence, appear to be principally these: that, in the absence of all suspicion of sinister motives, a fair presumption arises that entries made in the ordinary routine of business are correct, since, the process of invention implying trouble, it is easier to state what is true than what is false; that such entries usually form a link in a chain of circumstances, which mutually corroborate each other; that false entries would be likely to bring clerks into disgrace with their employers; that, as most entries made in the course of business are subject to the inspection of several persons, an error would be exposed to speedy discovery; and that, as the facts to which they relate are generally known but to few persons, a relaxation of the strict rules of evidence in favour of such entries may often prove convenient, if not necessary, for the due investigation of truth.[1] The value of the evidence will, of course, considerably depend upon the concurrence of two or more of the above circumstances. The leading case in English law on the present subject is that of *Price*

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the absence of her husband. B saw through his designs, begged him not to disgrace the family, and threatened to tell his wife and their relations. He watched his opportunity and attacked her with a *dao* (a big knife), inflicting the most frightful injuries. He had clearly determined to remove her from his path. The woman was carried into hospital, and, while expected to die every moment, she made a statement to the Magistrate that her injuries had been inflicted by a lunatic living in the same village. She made a miraculous recovery, and having regained strength, charged the real culprit, whose brother, the headman of the village, had invented the story of the lunatic having inflicted the injuries, and had induced her to tell it. She described in a manner that left no doubt as to the truth of her tale, how she was over-persuaded by the whole family, including her own mother, who felt helpless in the absence of her sons; and how the accused had helped to carry her into the hospital and had there remained ostensibly watching over her, but really to prevent her from altering her statement. It was only on her husband's return that her mind got free of these influences, and she told the truth.

[1] Taylor, § 630.

v. *the Earl of Torrington.*[1] The facts of this case were as follow:—The plaintiff, a brewer, brought an action against the Earl of Torrington for beer sold and delivered, and the evidence given to charge the defendant was this, that the way of the plaintiff's dealing was, that the draymen came every night to the clerk of the brew-house and gave him an account of the beer they had delivered out, which he set down in a book kept for that purpose, *to which the draymen set their names*, and that the drayman was dead, but that this was his hand set to the book; *and this was held good evidence of a delivery: otherwise of the shop-book itself singly without more.* The following are other instances of the application of the rule. The endorsement of service on a copy of a notice made by an attorney, who served it, was admitted after his death as proof of service. An entry by a deceased solicitor in his diary of his having attended a client on a certain day on her executing a deed of appointment, was held sufficient evidence of the due execution of the deed. *Rawlins* v. *Rickards*, 28, Beavan's Rep. 370, and see Illustration *(c)*. The entry of the receipt of taxes by a deceased clerk of the Collector, *who was duly appointed*, was admitted as evidence of their payment. The letter-book of a merchant, in which a deceased clerk had made a copy of a letter and a memorandum of having sent the original, was admitted as proof of the sending, and also of the contents of the original, after defendant, having been served with notice, failed to produce it. In the following case the evidence was held *inadmissible*:—It was the ordinary duty of one of the workmen at a coal-pit, named *Harvey*, to give notice to the foreman of the coal sold. The foreman, *who was not present when the coal was delivered*, being himself unable to write, employed a man named Baldwin to make the entries in the books from his dictation, and these entries were read over every night to the foreman. Harvey and the foreman being dead, Baldwin was called with the book to prove delivery of the coal; but the evidence was held inadmissible on the ground that, although the entries made under the foreman's direction might be regarded as made by him, yet as he had no *personal knowledge* of the facts stated in them, but derived his information at second hand from the workmen, there was not the same guarantee for the truth of the entries as in *Price v. Torrington*, where the party signing the entry had himself done the business. *Brain* v. *Preece*, 11 Meeson and Welsby's Rep. 773. It is a common practice in India for a shop keeper in a bazar, who cannot himself write, to have his credit-sales entered every evening by a *mohurrir* or clerk, who earns a livelihood by performing this duty for some dozen or more shop-keepers residing in the same place. This clerk is seldom or never present when a sale is being made. The shop-keeper tells him

[1] See 1 Smith's Leading Cases, 277; 1 Salkeld's Reports, 285; 2 Lord Raymond's Reports, 873.

from memory the sales of the day, and he enters them accordingly. These entries would seem to be inadmissible for the reason given above, namely, that the *mohurrir* had no *personal knowledge* of the sales. Again, a shop-keeper can write figures merely, or can mark a score on a bit of *bambú* or other substance, and these rough accounts supplemented by memory are periodically written up in the *khatá* (a kind of ledger) by this itinerant clerk Entries so made in a *khatá* would seem to be liable to the same objection.

Under English law entries in the course of business must be shown to have been made *contemporaneously with the facts which they relate* or they will be inadmissible. Amid the hurry and distraction of business, it is argued, the particulars of matters not entered at the time may be forgotten or mis-stated. The provisions of the Indian Evidence Act contain no similar restriction as to the *admissibility* of this kind of evidence; but, in determining the weight to be allowed to it in particular cases, it will always be important to consider how far the statement or entry was contemporaneous with the fact to which it relates. The sale of a valuable Cashmere shawl might be entered a day or two after without any risk of error, while a retail shop-keeper would have some difficulty in remembering on the following morning the particulars of a couple of dozen articles sold at different prices—this single transaction being one of fifty or a hundred similar sales made on the same day. Even under English law, the question whether the evidence was sufficiently contemporaneous to be admissible, is one to be decided with reference to the circumstances of each particular case. Under the provisions of the Indian Evidence Act, not the *admissibility* but the *weight* of the evidence will depend upon the same circumstances. Entries made in the course of business are, under English law, evidence only of those things, which according to the course of business, it was the duty of the person to enter, and are no evidence of *independent collateral matters.* In the case of *Chambers* v. *Bernascone*,[1] Lord Denman, delivering the unanimous opinion of the Exchequer Chamber, said—"We are all of opinion that whatever effect may be due to an entry made in the course of any office, reporting *facts necessary to the performance of a duty*, the statement of other circumstances, however naturally they may be thought to find a place in the narrative, is no proof of those circumstances." This restriction also on the admissibility of this kind of evidence is not to be found in the Indian Evidence Act. The statement or entry, to be admissible must relate to a fact *relevant* to the case; and it would appear to make no difference, so far as the question of admissibility is concerned, whether this fact is or is not a collateral one. Whether this fact naturally finds a place in the

[1] Crompton, Meeson, and Rosco's Reports, 368; and See 1 Smith's Leading Cases, 280.

narrative, what is the nature of its connection with the fact, the statement of which was matter of duty, and whether this connection was such as to raise a presumption of accuracy of information or observation, must, however, be questions of importance in estimating the weight due to such evidence when it relates to collateral matters merely.

Before these statements are admitted it must be shown that the person who made then is dead, or cannot be found, or has become incapable of giving evidence, or that his attendance cannot be procured without an unreasonable amount of delay or expense: and the burden of proving this is on the person who wishes to give the evidence; see section 104, *post*, and the remarks, *ante* p. 114. Evidence of the *ordinary course of business* will also be necessary, and in connection with this see Illustration (*f*) to section 114, *post*. Where the statement is a written one, evidence must be given that is in the handwriting of the person alleged to have made it; and this may be done by calling a witness who saw him write it or who is conversant with his handwriting. Sections 34 and 35, *post*, have a certain connection with the present subject. The distinction between the rule just treated of and the provisions of these sections will be pointed out in the Notes to the latter, in which will be also found some description of certain books, &c., peculiar to the ordinary course of business in India. It would not be very easy to give a detailed account of all the documents, receipts, &c, to which the provisions of the law may become applicable: but there is one kind of receipts, a few decisions relating to which may be usefully noticed in this place. I allude to *dakhilahs*, or receipts for rent, so common in the experience of judicial officers of all grades in India. In the case of *Kritibas Myté* v. *Ram Dhun Khurah* (IV R. C. and C. R. Act X Rul. 5; VII W. R. 526; II Indian Jurist, N. S. 197) it was decided by a Full Bench of the Calcutta High Court, overruling certain previous decisions, that *dakhilahs* filed by a ryot and not disputed or denied by his landlord, cannot be presumed to be genuine from such non-denial merely, but must be proved by legal evidence in the usual way. Approving of certain observations in a previous decision on the same subject, *Peacock, C. J.*, further however remarked that a ryot cannot be expected in every case to summon all the agents of his landlord who gave him rent; that, if he produces *dakhilahs* and swears that they are genuine documents which were delivered to him by the landowner or his *gomashtah* (agent), or gives other *primâ facie* evidence to show that they are genuine, whether for the purpose of proving that rent has been paid in a suit for arrears, or to prove that rent has been paid at a fixed rate for a certain number of years for the purpose of barring a landlord's claim to enhance, such dakhilahs are strong evidence, if the landlord or his agent do not come forward to deny them. See also *Mohabír Singh* v. *Dhíraj Singh and others*, V R. C. and C. R., Act X, 19; *Ram Jadú Gangúl*

v. *Luckhí Narain Mandal*, id. 23, and VIII W. R., 488; *Ganga Narain Das and others* v. *Saroda Mohan Rai Chaudhrí* III B. L. R. 230.

Statements against interest.

III. The admissibility of statements or entries *against the interest* of the person who made them is grounded upon the strong improbability of a man's saying or doing that which is opposed to his own interests. One of the leading cases on this subject is that of *Higham* v. *Ridgway*.[1] Here the question at issue was the exact age of one William Fowden, Junior; and, in order to prove the date of his birth, the Court admitted as evidence an entry of having delivered his mother on a certain day, made by a man-midwife in one of his books, and proved to be in his handwriting, such entry referring to a ledger, in which a charge for attendance was made and marked—PAID.[2] It will be observed that the *date* was in no way against the interest of the person who made the entry, but was wholly collateral to that portion of the entry, *viz.*, "*Paid*," which was against interest, as showing that a certain sum of money was no longer due, and owing to such person. On this point Lord Ellenborough, in pronouncing judgment, said:—"It is idle to say that the word *paid* only shall be admitted in evidence without the context, which explains to what it refers: we must, therefore, look to the rest of the entry to see what the demand was which he thereby admitted to be discharged." This case is, therefore, a direct authority that statements and entries against interest may be received as evidence of *independent and collateral matters, which, though forming part of the declaration, are not in themselves against the interest of the declarant.* This rule has, however, no application in the case of documents containing entries of independent matters, which have no connection with and need not be read to explain the entries which are against interest. Thus in an account rendered by a steward containing on one side items charging himself with the receipt of certain moneys, and on the other side items discharging him by showing how the moneys received had been disbursed, the discharging entries were held not to be admissible in evidence, unless where they were necessary to explain the charging entries or were expressly referred to by them.[3] In India, however, the provisions of section 34, *post*, must be borne in mind.

In several English cases it was held that the declarant must be shown to have had *a competent, if not a peculiar, knowledge* of the facts which formed the subject-matter of the declaration. In a later

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[1] See 2 Smith's Leading Cases, 270; and 10 East's Reports, 109.

[2] It may be observed that Illustration (*b*) is the case of *Higham* v. *Ridgway*, with the portion of the entry which was *against interest* omitted. It is intended to illustrate the rule as to *course of business*, not that as to statements against interest.

[3] *Doe* v. *Beviss*, 18 Law Journal Reports, C. P. 128; 7 Common Bench Reports 456, S. C.

case,[1] however, it was decided that it was not necessary that the person should have his own knowledge of the fact stated; that if the entry charged himself, the whole of it became admissible against all persons; and that the want of such knowledge went to the weight, and not to the admissibility of the evidence. The absence of all restriction in the Indian Evidence Act shows that the principle here laid down has been adopted. It was also decided in England that it is not necessary to the admissibility of this kind of evidence that the declarant should have been competent, if produced as a living witness, to testify to the facts contained in the declaration; nor does it affect the reception of the evidence that these facts are provable by living witnesses, who might be called. Nor it it indispensable that written declarations should be in the handwriting, and bear the signature of the declarant; but they will be received if they were written by him wholly or in part, though not signed; or, if signed by him, though written by a stranger; or, even though not written or signed by him, if proved to have been written by his authorized agent, or to have been adopted by him. The written statement is, however, inadmissible where there is no proof that it was either written, or signed, or authorized, or adopted by the person against whose interest it militates. Whether these statements will be admissible under the Indian Evidence Act, unless actually *made*, *i. e.*, written by the declarant himself, may be doubtful, having regard to the words of the law, *viz.*, "Statements, written or verbal, of relevant facts *made* by a person, who is dead." &c. Where written statements are in the handwriting of the declarant, proof of the handwriting should be given in the usual way (see *ante*, p. 119). If, however, the entries are thirty years old, this proof *may* be dispensed with under the provisions of section 90, *post*.

The student will not fail to draw in his own mind the distinction between statements against the interest of the person making them, which are relevant as admissions under section 18, *ante*, against such persons and his privies only, and the statements now under notice, which are admissible equally against strangers.[2] The *contemporaneousness* of the statement with the facts to which it relates, which, as we have seen (*ante*, p. 118) is a consideration of some importance in connection with statements made *in the course of business*, has never been regarded as very material in the case of statements *against interest*, the attention and care ordinarily given by men to concerns in which their interests are involved being supposed to be sufficient guarantees against inaccuracy. It will, however, be easy to conceive cases, *e. g.*, that of a

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[1] *Crease* v. *Barrett*, 1 Crompton, Meeson, and Roscoe's Reports, 925; 5 Tyrrwhit's Reports, 464, S. C.

[2] It may seem scarcely necessary to observe that the statements referred to in all the eight paragraphs of Section 32 are relevant against strangers.

heedless spendthrift heir, who has just succeeded to an inheritance, in which these guarantees would be of little value. This is, however, a point concerned not with the admissibility but with the weight of the evidence. The same remark applies to the *amount* of interest involved, which is not wont to be very nicely weighed, but upon which the degree of attention likely to secure accuracy must materially depend.

Whether a statement by a party acknowledging the payment of money as due to himself is admissible as a statement against interest, where *such statement is the only evidence of the charge of which it shows the subsequent liquidation*, is a question upon which the authorities under English law are conflicting. The reader will find the subject discussed in Mr. Taylor's work §§ 609, 610, who considers the preponderance of authority in favour of the admissibility of the evidence. There is nothing in the Indian Evidence Act to prevent the admission of these statements in the particular case stated; but here, as elsewhere, any objection that may be made will go not to the admissibility but to the weight of such evidence. In connection with this point, it will be important to notice a class of statements which may appear to be admissible, either as being against interest or as having been made in the course of business. I allude to *indorsements of the payment of interest or of part of the principal* on bonds and similar documents.[1] Such indorsements, if made before the claim became barred by the law of limitation, would be against the interest of the payee, inasmuch as he would be unable to recover the sums so indorsed as *paid;* but, if they were made *after* the claim became so barred, they would be *for* and not *against the creditor's* interest, seeing that by admitting a small payment he would be enabled to recover the larger remaining portion of the debt. Whether, then, the indorsement was admissible as an entry against interest depended upon the question whether it was *bonâ fide* made before the claim became barred by limitation. Mr. Taylor (§§ 623—629) carefully discusses the subject, and contends that the indorsement ought not to be admitted until it be shown by evidence *dehors* the intrument that it was made at a time when it was against the interest of the creditor to make it. In the case of *Rose* v. *Bryant* (2 Campbell's Reports, 321), Lord Ellenborough said: "I think you must prove that these indorsements were on the bond at or recently after the times when they bear date, before you are entitled to read them. Though it may seem at first sight against the interest of the obligee to admit part payment, he may thereby in many cases set up the bond for the residue of the sum secured. If such indorsements

[1] It is very common in India for bonds to contain a stipulation that all payments shall be endorsed thereon, otherwise that no allowance will be made therefor. Such a stipulation will not, however, be a bar to proof of payments not so indorsed (*Kali Dass Mitra* v. *Tara Chand Rai*, VIII W. R. 316; *Girdhari Singh and others* v. *Lallú Kúnwar*, III W. R. Mis. Ap. 23).

were receivable whensoever they may have been written, this would be allowing the obligee to manufacture evidence for himself * * * I have been at a loss to see the principle on which these receipts, in the handwriting of the creditor, have sometimes been admitted as evidence against the debtor; and I am of opinion they cannot be properly admitted, unless they are proved to have been written at a time when the effect of them was clearly in contradiction to the writer's interest." When the first edition of this work was published, *part payment of interest or principal* did not, under the Indian law of limitation (Act XIV of 1859) revive the right to sue for the remainder of a debt. The consideration of the present question was, therefore, of importance only in connection with a class of cases common in India, and as to which there has been some conflict of decision, *viz.*, where a money-bond contains a stipulation that the sum secured thereby shall be payable by instalments, and that, on default being made in the payment of any one instalment, the whole amount or the aggregate of all the instalments shall become due and payable. Default being made in the payment of one instalment, the cause of action in respect of the whole amount accrues, and limitation therefore begins to run (*Haronath Rai and others* v. *Maherúla Múlah* Full Bench, VII W. R. 21; *Breen* v. *Balfour*, Bourke's Reports, 120; *Enayatúla Chaudhrí* v. *Haro Chandra Dey*, II W. R. 39; but see *Halodhur Bangal* v. *Hogg*, I W. R. 189; *Ram Krishna Mahadev* v. *Bayaji bin Santaji*, V Bom. Rep. A. C. 35; and *Baldín* v. *Golab Kúnwar*, I. N. W. P. Rep. F. B. 102). The obligee of a bond, who has lost his right of action in this way, may attempt to evade limitation by indorsing the payment of one or more instalments, such indorsement having the semblance of being against interest, but being in reality the very contrary. In cases of this nature it is submitted that, if the indorsement be offered as an *entry against interest*, it would be inadmissible until shown to be really such by evidence that it was made at a time when it was actually against the interest of the obligee to make it. If offered as a memorandum or acknowledgment made *in the ordinary course of business*, the necessity for such preliminary evidence may be more doubtful. In either case, however, the weight to be attached to such a memorandum ought to be carefully considered with reference to the whole of the attendant circumstances.

Rule as to part payment altered.

The rule of law that part payment of interest or principal shall not revive the right to sue for the remainder of the debt has recently been altered in India; it still, however, differs in some important particulars from the rule followed in England. Section 21[1] of the new Limitation

[1] This section comes into operation on the 1st April, 1873. See Section 1 of the Act itself.

Act, IX of 1871, enacts as follows:—"When interest on a debt or legacy is, *before the expiration of the prescribed period*,[1] paid as such by the person liable to pay the debt or legacy, or by his agent generally or specially authorized in this behalf,—or when part of the principal of a debt is, *before the expiration of the prescribed period*,[1] paid by the debtor or his agent generally or specially authorized in this behalf, —a new period of limitation, according to the nature of the original liability, shall be computed from the time when the payment was made: *provided* that, in the case of part payment of principal, the debt has arisen from a contract in writing, and the fact of the payment appears in the handwriting of the person making the same, *on the instrument* or in his own books, or in the books of the creditor." The express provision that the payment, whether of interest or principal must, in order to create a new period of limitation, have been made *before the right to sue had become barred*,[2] may seem to require proof of the time of payment in all cases. Where the payment is of part of the principal, the *proviso* will in most cases afford a security against fraud:[3] but where the payment is of *interest* only, the remarks just made as to instalment-bonds appear to be equally applicable.

Four kinds of interest.

The *interest* against which the statement must be in order to be relevant, may be one of four kinds—I. Pecuniary; II. Proprietary; III. Interest in escaping a criminal prosecution; IV. Interest in escaping a suit for damages. Statements, made orally or written in accounts, are the most common instances of the application of the rule to *pecuniary interest*, and this portion of the subject is sufficiently plain to stand in need of no further elucidation. With respect to *proprietary* interest, the most common statements are those made by persons while in possession of land, explanatory of the character of that possession. Such statements, if in *disparagement* of the title of the person making them, are clearly against interest. They have been received to show the name of the landlord under whom the declarant held, the amount of the rent, the extent and nature of the tenure. There ought to be some evidence that the declarant was actually in possession, since otherwise his declaration that he has an interest, though limited, may appear to be a statement rather in his favour than otherwise. A careful distinction

[1] Of limitation, that is.

[2] It may be observed that under English law an acknowledgment in writing or part payment, made *after* the right to sue, has been barred, revives the cause of action. The new Indian Limitation Act adopts the views of those Jurists who contend that a legal obligation cannot survive the extinction of the cause of action.

[3] Even here, however, the question may arise, as the writing though made by the payer may be *undated*. In the case of written acknowledgments provided for by Section 20, oral evidence is expressly made admissible to prove the *time* (see clause (*c*). Section 21 contains no similar express provision, but oral evidence would probably be admitted for the same purpose.

must be drawn between statements made by an occupier of land in disparagement of *his own title*, and those statements which merely go to abridge or encumber the estate or tenure itself. "For instance," says Mr. Taylor, "if an occupier state that he is only tenant for *life*, this after his death will be admissible evidence against a stranger: but if he admit that the property was intersected by a public highway, or that a neighbour had an easement in the land in question, such admission will only bind himself and those who claim under him, and will be inadmissible to establish the highway or the easement as against his landlord or a stranger. The grounds for this distinction are obvious, for, though it is scarcely possible to imagine any inducement which will lead a person possessed of premises in fee to admit that he is only a tenant, many causes might induce a tenant to acknowledge the existence of an easement or a highway, which might be either not inconvenient, or even absolutely beneficial to him." (§ 620.) The same reasoning applies to cases in India. The holder of a rent-free (*lakhiraj*) tenure would be very unlikely to admit that the land was rent-paying (*mál*);[2] the holder of a protected tenure would be unlikely to admit that he was a mere ordinary ryot; but a ryot with a right of occupancy or holding at a fixed (*mokurreri*) rent, might find it greatly to his advantage to admit an easement for the maintenance of a *bund* or embankment which took up but a small portion of his land, and that of other ryots, while it secured them a good supply of water necessary for raising a profitable crop. It must, however, be observed that there is nothing in the Indian Evidence Act which makes the question of admissibility depend upon the distinction just noticed. Here, as elsewhere, any objection that may be made will go not to the admissibility but to the weight of the evidence. The Courts in England admit statements made against proprietary interest as evidence not merely of the extent of the declarant's interest in the land, but also of any fact not foreign to the statement, and which forms substantially a part of it. The same rule will doubtless apply in India, but the fact must be a *relevant* fact.

Statement which exposes to Criminal Prosecution or Suit for Damages.

In the *Sussex Peerage* case[1] statements made by a deceased clergyman, who had married two persons, were tendered in evidence to prove the marriage, on the ground that they were clearly against his interest, inasmuch as they related to an act which rendered him liable to a criminal prosecution while living. These statements were, however, rejected, Lord Brougham remarking thus—"To say, if a man should confess a felony for which he would be liable to prosecution, that therefore the instant the grave

[1] 11 Clark and Finnelly Reports, House of Lords, 103; and see also *Davis* v. *Lloyd*, 1 Carrington and Kirwan Reports, N. P. 276.

[2] For an example of such an admission, however, see *Forbes* v. *Mir Mahomed Taki*, V. B. L. R. 530.

closes over him, all that was said by him is to be taken as evidence in every action and prosecution against another person, is one of the most monstrous and untenable propositions that can be advanced." Yet this proposition, thus pronounced monstrous aud untenable by one who did perhaps more than any other single individual to break down the old barriers against *admissibility*, has come to find favour with more modern reformers, who have carried it into effect to an extent never even contemplated by those who argued and decided the *Sussex Peerage* case, the Indian Law of Evidence making the statement admissible, not only if it expose to a criminal prosecution, but also if the interest of the declarant be liable to suffer in a much less serious way, by a suit for damages; and, further, the statement is admissible not only when the grave has closed over the person who made it, but also though he may be still living, if he cannot be found or has become incapable of giving evidence, or if his attendance cannot be procured without an amount of delay or expense, which under the circumstances of the case appears to the Court unreasonable.*

The words "would have exposed him" require some observation. They will no doubt be construed to mean "would have exposed him at the time that the statement was made." It could never have been intended that a statement made after the risk had passed away, as for example, after a suit for damages had become barred by limitation or after the expiry of the two years within which prosecutions for offences under the Indian Christian Marriage Act must be instituted (See Sec. 76. Act XV of 1872), should be admitted merely because, if made some months or weeks earlier, it would have exposed to a criminal prosecution or to a civil suit for damages.

Statements giving opinion as to Public Right or Custom or matters of General Interest.

IV. The admissibility of these statements is explained by Mr. Taylor on the following grounds—"that the origin of the rights claimed is usually of so ancient a date, and the rights themselves are of so undefined and general a character, that direct proof of their existence and nature can seldom be obtained, and ought not to be required; that in matters, in which the community are interested, all persons must be deemed conversant; that as common rights are naturally talked of in public, and, as the nature of such rights excludes the probability of individual bias, what is dropped in conversation respecting them may be presumed to be true; that the general interest which belongs to the subject would lead to immediate contradiction from others, if the statements proved were false; that reputation can hardly exist without the concurrence of many parties unconnected with each other, who are all alike interested in investigating the subject; that such concurrence furnishes strong presumptive evidence of truth; and that it is this prevailing current of assertion which is resorted to as evidence, for to this every

member of the community is supposed to be privy, and to contribute his share"—§ 544. In estimating the weight to be allowed to this evidence in individual cases in India, the applicability of these reasons to a different state of society may well be taken into consideration. A distinction has been drawn under English law between the meaning of the terms "*public*" and "*general*," the former being applied to that which concerns every member of the State, while the latter is limited to a lesser, though still a considerable portion of the community, as for example, to the persons living in a particular district or neighbourhood. In matters strictly public, reputation from any one has been held receivable, while in matters of general interest merely the testimony of persons wholly unconnected with the place has been regarded as inadmissible. So far as *admissibility* is concerned, the Indian Act makes no distinction; but in estimating the weight to be allowed to the evidence in any particular case, it would make a wide difference whether the statement were that of a person living in the vicinity and therefore likely to have information, or that of a person living at a distance and not in the habit of visiting the neighbourhood. In connection with this point attention should be paid to the express words of the law—"of the existence of which, if it existed, he would have been likely to be aware." The Indian Evidence Act here follows English law: "It appears," say Mr. Taylor, "that competent knowledge in the declarant is an essential pre-requisite to the admission of his testimony; and, although all the Queen's subjects are presumed to have that knowledge in some degree where the matter is of public concernment, yet, in other matters, which are not strictly public, though they are interesting to many persons, some particular evidence of such knowledge is generally required." (§ 546.) This particular evidence will, however, not be necessary when the statement is that of a person who may fairly be presumed to be acquainted with the matter in question, as for example, in England, of a copy-holder, who may fairly be presumed to be acquainted with the customs of the manor. It was at one time thought in England that proof of the exercise within the period of living memory of the right claimed was a necessary preliminary to the admission of this evidence: but that doctrine has been of late years overruled, and it finds no place in the Indian Evidence Act. It may seem scarcely necessary to remark that these statements are admissible against as well as in favour of a public right or custom, or matter of public or general importance.

The statement declared by the Act to be relevant is a *statement which gives the opinion* of the person making it. The English rule while it rejects evidence of reputation in regard to *particular facts*, receives it upon general points. All the members of the community have a common and general interest in public and general matters: but particular facts are likely to be known but to few individuals,

and may be misrepresented or misunderstood by those who have not personal knowledge of them; while, moreover, they may be connected with other facts, by which, if known, their effect might be controlled or limited or explained. Evidence of particular facts would appear to be equally excluded by the language of the Indian Act. It may, however, be well to consider the effect of Section 51, *post.*

The statement, in order to be relevant, must have been made *before any controversy as to such right, custom, or matter had arisen.* Where there is no dispute or controversy there is no reasonable probability of bias or other inducement to warp the truth; but once a dispute or controversy has arisen, no one, more especially of those who are enterested, remains indifferent; he takes one side or the other, and opinions are hastily, often rashly, formed upon imperfect information. The commencement of the controversy does not mean the commencement of the suit, but the commencement of the dispute, which has ultimately led to litigation. Mr. Taylor deduces the three following propositions from the English decisions upon this portion of the subject: *first,* that declarations will not be rejected in consequence of their having been made *with the express view of preventing disputes; secondly,* that they are admissible, if no dispute has arisen, though *made in direct support of the title of the declarant; thirdly,* that the mere fact of the declarant having stood or having believed that he stood in *pari jure* with the party relying on the declaration, will not render his statement inadmissible. Under English law the controversy which excludes this evidence must have related to the *particular subject in issue.* A dispute as to other points connected with the same matter will have no excluding effect. For example, in a suit between a copy-holder and his lord as to whether a certain customary fine was *to be assessed by the jury* of the lord's Court, depositions in an ancient suit where the controversy turned on the *amount* merely of this fine, were admitted. The words of the Indian Act "before any controversy as to such right, custom, or matter had arisen," are susceptible of a wider interpretation, and might be held to exclude the statement, where the controversy related to a different point connected with the same right, custom, or matter. The evidence will be excluded even though the former controversy were *between different parties,* or had reference to *a different property, or a different claim,* if the actual matters to which the statement relates were clearly under discussion in the former dispute; and it will be also excluded even though the persons who made the statement were at the time of making it *unaware of the existence of the controversy.* "If an enquiry were to be instituted in each case," said Sir J. Mansfield in the Berkeley Peerage case, "whether the existence of the controversy was or was not known at the time of the declaration, much time would be wasted, and great confusion would be produced."

The following are a few examples, taken from English decided cases, of questions, in respect of which these statements have been admitted:—Questions relating to a manorial custom; to the limits of a town; to the boundaries of counties and parishes (where the evidence was offered to prove the boundaries of two private estates, it was rejected); to the right to claim tolls on a public road; to the fact whether a road was public or private; to a right of ferry; to the fact whether land on a river was a public landing place or not. The evidence was rejected when tendered to prove that a person had a private right of way over another man's land. The Indian decided cases furnish few examples. *Illustration (i)* is taken from those parts of the country in which the village system still exists: it has long died out in Lower Bengal. Public rights or customs are little understood; and the order of the Government or of the executive head of a district is generally conclusive as to such. In large *zemindaries*, questions however occasionally arise somewhat analogous to those which occur in manors in England. The following are a few examples: as to the *zemindar's* right to take dues on the sale of trees (*Paul Rai and others* v. *Ram Hit Panday*, I N.-W. P. Rep., p. 139), as to the *zemindar's* right to one-fourth of the sale proceeds in cases of involuntary sale, as in execution (*Bijnath Persad* v. *Mahomed Fazl Hossein*, III N.-W. P. Rep. 204).

The statement may be *written* or verbal. Written statements may be contained in deeds, leases, or other private documents, in maps (see Section 36, *post*), in depositions of witnesses, judgments (see Sections 40-43, *post*) or decrees of Courts, in settlement proceedings, in the record of rights (*wajib-úl-arz*) drawn up by settlement officers, in sánads, &c. With respect to judgments and decrees, it may be observed that they are admitted in England, even though pronounced *upon the matter directly in issue*, and in a cause litigated between strangers, not as proving any specific fact existing at the time, but as evidence of the most solemn kind, of an adjudication by a competent tribunal upon the state of facts and the question of usage at the time. A statement contained in a judgment previously pronounced upon the matter directly in issue would be excluded by that portion of the section now under discussion, which speaks of a *controversy* having arisen. If, however, it related to *a matter of a public nature*, it would be admissible under Section 42, *post*. But the admissibility under this section does not extend to *matters of general interest*, and herein the rule of admissibility laid down by the Indian Evidence Act is more restricted than that followed in England.

V. & VI. The fifth and sixth clauses of the section deal with the relevancy of two classes of statements which are usually treated by English text-writers under a single head in discussing the admissibility of certain kinds of evidence in *matters of pedigree*. It will be convenient to deal

V. Statement as to relationship, made by person having special means of knowledge.

with the subject-matter of the two clauses in a single exposition, but before proceeding to do so it may be well to draw attention to the distinction between the kinds of evidence to which each clause refers. The statement declared relevant by the *fifth* clause is a statement relating to the existence of any relationship between persons, *alive or dead* (the language imposes no restriction), as to whose relationship the person making the statement had *special means of knowledge.* The statement provided for by the sixth clause is a statement relating to the existence of relationship between *deceased persons only.* It is not necessary that it should have been made by a person who had special means of knowledge, but *it must be contained in a will or deed relating to the affairs of the family to which any such deceased person belonged, or in a family pedigree, or upon a tombstone, family portrait, or other thing on which such statements are usually made.* Both statements alike in order to be relevant must have been made *before the question in dispute was raised* (see *ante*, p. 128). The admission of this evidence is a further exception to the rule (Section 60, *post*), which requires all facts to be proved by direct evidence: *i. e.*, facts which can be seen by those who saw them; facts which can be heard by those who heard them, &c. "This exception," says Mr. Taylor, "has been recognized on the ground of necessity; for, as in inquiries respecting relationship or descent, facts must often be proved which occurred many years before the trial, and were known but to few persons, it is obvious that the strict enforcement of the ordinary rules of evidence in cases of this nature would occasion a grievous failure of justice. Courts of law have, therefore, so far relaxed these rules in matters of pedigree as to allow parties to have recourse to traditional evidence,—often the sole species of proof that can be obtained. Still it is not considered safe to admit such evidence without qualification; and, though it was long doubtful whether the declarations of servants, friends, and neighbours might not be received, the settled rule of admission is now restricted to hearsay proceeding from persons who were *de jure related by blood or marriage to the family in question*, and who, consequently, may be supposed to have had the greatest interest in seeking, the best opportunities for obtaining, and the least reason for falsifying, information on the subject." (Taylor, Vol. I. § 571.) Under English law, therefore, the declaration of an *illegitimate* member of the family would be inadmissible.[1] The 47th section of the repealed Act (II of 1855) rescinded the English rule on this subject, and admitted the declarations *not only of illegitimate members of the family, but also of persons who, though not related by blood*

VI. Statement as to Relationship between Deceased persons made in Will, Deed, &c.

[1] *Doe* v. *Barton*, 2 Maclean and Robinson's Scotch Appeals, 28; *Doe* v. *Davies*, 10 Adolphus and Ellis' Queen's Bench Reports, N. S. 314.

or marriage, were yet intimately acquainted with the members and state of the family. The latter portion of this section would have included servants, friends, and neighbours, who are excluded under English law. The propriety of the extension of the rule at least to illegitimate members of the family cannot be doubted, having regard to the domestic relations in the East; and the whole section was a strong instance of the tendency of modern reform, which, making *admission* the rule and *exclusion* the exception, leaves it to the Court to estimate the weight to be allowed to particular kinds of evidence in individual cases. The rule now laid down by the Indian Evidence Act is still more general in its terms than the above-quoted section of the Act of 1855, which was directed merely to modify the strict rule of English law. It renders admissible the statements not only of persons deceased (whose statements only are admitted in England), but also of persons who cannot be found, or who have become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay and expense, which, under the circumstances of the case, appears to the Court unreasonable, if such persons had *special means of knowledge* of the relationship to which the statement relates. Proof of this special means of knowledge will be a pre-requisite to the admission of the evidence, and this proof must be given by the party who wishes to give such evidence (see Section 104, *post*). It is a moot point under English law whether the statement of a deceased person, asserting his own illegitimacy, can be received as evidence against third parties. It is, of course, admissible against himself and those who claim under him by a title derived subsequently to the making of the statement. With respect to its admissibility against strangers, it is argued[1] that he could know of his own illegitimacy only by information received from others; but, as a bastard is in the eye of the law *filius nullius*[2] and has no relations, the hearsay must have been derived from strangers, and is therefore inadmissible. This argument has no application in India, where the hearsay not only of *relations*, but also of *strangers*, if they have had special means of knowledge, is admissible. There would appear to be little doubt, therefore, that the statement of a deceased person asserting his own illegitimacy is relevant against strangers under the Indian Evidence Act. Under English law this evidence cannot be successfully objected to on the ground that it is *hearsay upon hearsay*, provided that all the statements come from persons whose declarations on the subject are admissible. Thus, the declarations of a deceased widow respecting a statement which her husband had made to her, as to who his cousins were; the declaration of a relative in which he asserted generally that he had *heard* what he stated; and even general repute in a family, proved by the testimony of a surviving member, have been

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[1] Taylor, Vol. I. §§ 572, 573.

[2] "The son of nobody."

admitted. It may be doubtful whether these statements could be admitted under the *fifth* clause of the section of the Indian Evidence Act. *Special means of knowledge*, having regard to the meaning usually given to these words, might be held scarcely to include opportunities of hearing that of the truth of which the hearer had no personal means of judging. So far as the *sixth* clause is concerned, there is no restriction on admissibility. It is improbable that any person would insert in a solemn deed, will, &c., any matter, the truth of which he did not know or had not ascertained.

We have seen that in matters of *public* or *general* interest declarations as to *particular facts* are excluded. The same rule does not, however, apply here. "In cases of general right which depend upon immemorial usage," said Sir J. Mansfield in the Berkeley Peerage case,[1] "living witnesses can only speak of their own knowledge to what passed in their own time; and, to supply the deficiency, the law receives the declarations of persons who are dead. There, however, the witness is only allowed to speak to what he has heard the dead man say respecting the reputation of the right of way, or of common, or the like. A declaration with regard to a particular fact, which would support or negative the right is inadmissible. In matters of pedigree, it being impossible to prove by living witnesses the relationships of past generations, the declarations of deceased members of the family are admitted; but here, as the reputation must proceed on *particular facts*, such as marriages, births, and the like, from the necessity of the thing, the hearsay of the family as to these particular facts is not excluded. General rights are naturally talked of in the neighbourhood, and the family transactions among the relations of the parties. Therefore, what is dropped in conversation upon such subjects may be presumed to be true."

Mr. Taylor expresses an opinion that this evidence must be *confined to such facts as are immediately connected with the question of pedigree*, and that declarations as to *independent* facts from which the date of a genealogical event may be *inferred*, will probably be rejected. In a question of legitimacy, turning upon the *time* of birth, a declaration by the deceased sister of the alleged bastard's mother, stating that she had suckled the child, was tendered in evidence, coupled with proof of the time when her own child was born, for the purpose of fixing the alleged bastard's birth at a period subsequent to its parent's marriage. Mr. Baron Gurney admitted the evidence, but Lord Cottenham held it to be inadmissible. The suckling of the child had no *direct* bearing on its age or legitimacy, but was only a species of circumstantial evidence.[2] Where, however, the question at issue related to the relative seniority

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[1] 4 Campbell's Reports, 415.

[2] Consider Section 11, *ante*, if such a case arises in India.

of three sons, born at a birth, declarations by the father that he had christened them Stephanus, Fortunatus, and Achaius, according to the order of the names in St. Paul's First Epistle to the Corinthians, for the purpose of distinguishing their seniority; and also declarations by an aunt, who was present at the confinement, and with a similar object tied strings round the arms of the second and third child, were admitted, as bearing *directly* on the fact to be proved. It was once thought that these declarations would not be received to prove the *place* where any of the events of pedigree occurred, but this proposition has been doubted; and, in *Shields* v. *Boucher*,[1] Vice-Chancellor Knight Bruce intimated a strong opinion that, in a controversy merely genealogical, declarations made by a deceased person as to where he or his family came from, "of what place" his father was designated, and what occupation his father followed, would be admissible and might be most material evidence for the purpose of identifying and individualizing the person and family under discussion. Declarations by a deceased person, that "he was going to visit his family at such a place," have been admitted to prove a tradition in the family that they had relations who lived at that particular place. Evidence has also been received of a family tradition, that a particular individual died in India, for the purpose of connecting that individual with the family of the claimant. The language of the Indian Evidence Act—"When the statement relates to the existence of any relationship between persons, &c.," *may* be interpreted to mean "relates *directly* or *indirectly*;" and, if this interpretation be adopted, the principle of the above cases will doubtless be followed in India. To extend the admissibility of evidence is part of the scope of the new Act, and no doubt that construction will be favoured which best accords with this scope and intention. The word "*pedigree*" in English law embraces not only general questions of descent and relationship, but also the particular facts of *birth*, *marriage*, and *death*, and the *times*, when these events happened. Whether a similar meaning will be given to the word "*relationship*" in the Indian Act, it is premature to discuss. Illustration *(l)*,[2] however, seems to indicate that it was not the object of the Legislature to exclude every portion of the statement, except that portion which bears directly upon the subject of actual relationship. The statement in the letter as to the existence of relationship might be wholly complete without any mention of the date of the child's birth.

There is one important restriction on the admissibility of this kind of evidence imposed by English law, but which finds no place in the Indian Evidence Act. The evidence is not admitted in every case in which the birth, marriage, or death of a person forms the subject of controversy, but in those cases only which directly or indirectly involve some question of relationship, and in which the fact sought to be estab-

[1] De Gex and Smale's Chancery Reports, 50, 56.
[2] *Ante*, page 110.

lished is required to be proved for some genealogical purpose. Under the Indian Act the statement is admissible, provided it relate to a fact *relevant* to the case. It will in no way affect the admissibility of this evidence, that there are living witnesses who can depose to the same fact: nor is it necessary that the statements should have been contemporaneous with the events to which they relate. On this latter point Lord Brougham remarked that such a restriction would defeat the purpose for which hearsay in pedigree is let in by preventing it from ever going back beyond the lifetime of the person whose declaration is to be adduced in evidence.

In connection with the present subject it may be well to make a few remarks about *family conduct*, which is usually treated as part of the subject by English text-writers. Such conduct has been admitted as evidence from which the opinion and belief of the family may be reasonably inferred. "If the father," said Sir James Mansfield in the Berkeley Peerage case, "is proved to have brought up the party as his legitimate son, this amounts to a daily assertion that the son is legitimate." So the concealment of the birth of a child from the husband, the subsequent treatment of such child by the person who, at the time of its conception, was living in adultery with the mother, the fact that the child and its decendants assumed the name of the adulterer, and had never been recognized in the husband's family as his legitimate offspring, were held to be circumstances that went far to rebut the presumption raised by law in favour of the legitimacy of the issue of a married woman. This evidence will be admissible in India under Sections 8, 9, or 11, *ante*, and under Section 50, *post*, *Q. V.* For an example, of family conduct admitted as evidence, see the case of *Mutuswamy Jagavera Yettapa Naiken* v. *Venkataswara Yettapa*, II B. L. R. P. C. 15.

It remains to make a few remarks more, especially on the *sixth* clause. The relationship to which the statement here relates must be relationship between persons deceased, and must also be contained in a will or deed[1] relating to the affairs of the family to which any such deceased person belonged, or in any family pedigree, or upon any tombstone, family portrait, or other thing on which such statements are usually made. Bibles, prayer-books, missals, almanacs, among Christians, and horoscopes among Hindús, are examples of other things on which such statements are usually made.[2] Entries in a family bible are admissible in England without proof that they were made by

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[1] The marginal note has "will or deed *of deceased person*. The words in *italics* appear to be a mistake. At any rate, they cannot affect the language of the section itself, marginal notes not being part of a statute, and being therefore incapable of altering the plain meaning of the text (*Claydon* v. *Green*, L. R. 3, C. P. 511).

[2] Whether *letters*, *correspondence*, &c., will be held to be so far *ejusdem generis* as to be included among "other things" may be doubtful. Their admissibility under clause 5 on proof of *special means of knowledge* is clear enough.

a relative. There is nothing in the clause of the Indian Act, now under notice, which requires that the statement in any of the things therein mentioned should have been made by a relative, or, indeed, which requires it to be shown at all by whom the statement was made. As to a will, see the case of *Nil Mani Chaudhri* v. *Zahirunissa Khanum and others*, VIII W. R. 371, where the incidental mention of a child's age in the recital of a will was held to be no proof of the exact age of such child. The published report of this case does not show whether the child was dead at the time the evidence was offered. If dead, the case is no longer law. With respect to *family pedigrees*, the Indian Act follows the principle laid down, after much discussion, in the case of *Davies* v. *Lowndes*.[1] The pedigree here traced the genealogy of the family from an almost fabulous antiquity down to the immediate contemporary relatives of the writer, and had the following memorandum at foot: "Collected from parish registers, wills, monumental inscriptions, family records, and history. This account is now presented as correct, and as confirming the tradition handed down from one generation to another, to T. L., this 4th day of July, A.D. 1733, by his loving kinsman W. L." The Exchequer Chamber decided that part, if not all, of this pedigree was admissible as evidence on the ground that a pedigree made or recognized by a member of a family may be presumed to have been so made or recognized by him in consequence of his personal knowledge of the individuals therein stated to be relations, or of information received by him from some deceased member of what the latter knew or heard from other members who lived before his time. If, however, the facts rebutted this presumption and showed that no part of the pedigree was derived from proper sources of information, then the whole of it ought to be rejected, or at least so much of it as appeared to have been derived from improper sources.

Inscriptions on tombstones, mural, and other funeral inscriptions, &c., may be proved by copies. See clause *(d)*, Section 65, *post*, and the definition of "document," Section 3, *ante*.[2]

As to relationship in cases governed by Mahomedan Law, see *ante*, p. 104.

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[1] 7 Scott's Reports, 21, S. C.; 5 Bingham's New Cases, 167.

[2] The testimony of Hindus as to the history of their family during preceding generations is occasionally more valuable than similar testimony given by persons of other races, certain castes of the Hindus observing it as a rule in the education of their children to teach them to repeat and keep in remembrance the names of their ancestors, *Letter from R. Adair, Esq., Collector of Bhaugulpore, to the Board of Revenue, dated 7th September* 1787, see *Amrit Nath Chaudhri* v. *Gauri Nath Chaudhri*, VI B. L. R., P. C., 124. "I must observe," writes Mr. Adair, "that on the many occasions I have had of comparing these accounts given by families, whose relationship was very distant and their interests in opposition, they have seldom varied in the steps by which they have followed their lines of descent back to one common stock."

Statement in Document relating to Transaction by which Right or Custom was created, recognized, &c.

VII. We have in the next place[1] to consider statements contained in any deed, will, or other document, which relates to any such transaction as is mentioned in section thirteen, clause *(a)*, that is, any transaction by which any right or custom was created, claimed, modified, recognized, asserted, or denied, or which was inconsistent with its existence. In the note to Section 13 *(ante*, p. 86), I have already remarked that the word "right" must be held to include *private* as well as *public* rights. It was for many years a disputed question in Westminster Hall whether hearsay evidence or evidence of reputation could be admitted to prove matters of private right or prescription; and the practice as to admitting or rejecting this kind of evidence varied on different circuits. In the case of *Didsbury* v. *Thomas*,[2] the question was whether a certain testator were, at the time of making his will and of his death, the owner of a certain farm, called 'Meadow Farm.' It was alleged for the plaintiff that he was the owner, having purchased it of Sir J. S., and permitted his son Richard to occupy it until his (the testator's) death. Several witnesses gave evidence that one G. R., a tenant of Sir J. S., occupied the farm before Richard had it; that Richard took possession of it some sixty-one years before the trial, and continued possessed as long as he lived, and occupied no other land which could have been his father's during that time; and that the testator lived some ten years after his son Richard took possession. Another witness deposed that Richard took possession of and occupied Meadow Farm at the same time when his brother Edward occupied another farm called 'Foxlow's Croft,' and that both farms were *reputed* to be the property of Sir J. S., and to have been purchased from him at the same time by the testator. A deed was then proved by which the testator had given to his son Edward the farm called 'Foxlow's Croft,' which said farm, "said the deed," has been lately purchased amongst other lands and hereditaments by the said S. W. (the testator) of and from Sir J. S., &c. Objection was taken at the trial to the evidence of reputation; but the learned Judge was of opinion that, coupled with the deed, the evidence was admissible. He thought that as it was in proof that Sir J. S. was the landlord of the Meadow Farm when occupied by G. R. before Richard's occupation; and that, as the deed also proved that Sir J. S. was also the owner of Foxlow's Croft, and that the testator had purchased that amongst other lands and hereditaments from him; and as it was also proved that both the sons took possession of their respective farms at the same time, there was a sufficient basis laid to admit reputation

[1] It may be observed that the statements made relevant by clauses VI and VII must be *written*, and that the word "verbal" at the commencement of the section has no application to these clauses.

[2] 14 East's Reports, 323, and see 2 Smith's L. C., 5th Ed., 432.

that those other lands and hereditaments referred to in the deed were the Meadow Farm. On a motion for a new trial it was contended that, though reputation alone in a matter of private right was not admissible, yet it was properly received when accompanied by the possession of the land at the time by the party to whom the evidence referred, and coupled as it was with the deed proved, the contents of which were confirmatory of the reputation. It was, however, decided that the evidence had been improperly received. In the case of *Morewood* v. *Wood*,[1] the question was whether the defendant had a prescriptive right of digging stones on the lord's waste. The plaintiff produced a *presentment* of the free-holders of the Court baron of the manor, of which he (the plaintiff) was lord, which presentment contained the following item:—"If any person gets stone without leave of the lord of the manor, we pain him 10*s*." This particular presentment was proved to have been signed by the defendant's grandfather, under whom he claimed. Other presentments signed by strangers were offered as evidence of reputation; and parol evidence of reputation, that none but the lord had the right to dig stone, was also tendered. This evidence was rejected, and on a motion for a new trial, the Judges were evenly divided (two against two) as to its admissibility. One of those who held it admissible (Buller, J.) was, however, of opinion that the evidence ought not to be received, except a foundation were first laid by other evidence of the right. Three out of the four Judges thought, however, that such evidence might be given as to a *particular custom*, though not as to a *private* prescriptive right. In *Clothier* v. *Chapman*[2] evidence of reputation of the boundary between two private estates was rejected. In the case of *Reg.* v. *The Inhabitants of Bedfordshire*,[3] the question was as to who were liable to repair a certain bridge, and parol evidence of reputation was admitted; but here the matter in dispute was one in which the public had some interest, and Lord Campbell in his judgment guardedly said that the relaxation of the general rule ought not to be extended to questions relating to matters of mere private interest, for respecting these direct proof may be given, and no trustworthy reputation is likely to arise.

It will be observed that the clause now under notice does not declare all reputation, parol or written, to be relevant; but that only which consists of statements contained in any deed, will, or other document relating to any transactions by which any right or custom was *created, claimed, modified, recognized, asserted, or denied, or which was inconsistent with its existence.* The clause, therefore, does not provide for the admissibility of *parol* evidence of reputation. It may be, however, that such evidence would become relevant under Section 11 (*ante*, p. 85),

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[1] 14 East's Reports, 327 n: M, 32 Geo. 3, B. R.

[2] 14 East's Reports, 331 n.

[3] 14 Jurist, 208; 4 Ellis and Blackburn's Reports, 535.

after a foundation had been laid by other evidence of the right (see remarks of Buller, J., *supra*, p. 137, in the case of *Morewood* v. *Wood*). Judgments and decrees not admissible under other sections of the Evidence Act will frequently become admissible under this clause, which is quite in conformity with the rule laid down in the case of *Lalla Ranglal and others* v. *Deo Narain Tiwárí*, VI B. L. R., 69.

Statements by a number of persons, expressing feelings or impressions.

VIII. Statements written or verbal, made by a number of persons and expressing feelings or impressions on their part relevant to the matter in question, are relevant and may be proved by the testimony of persons other than those who made them, when such persons are dead, or cannot be found, or have become incapable of giving evidence, or when their attendance cannot be procured without an amount of delay or expense, which, under the circumstances of the case, appears to the Court unreasonable. Whether it must be shown that *all* the persons who expressed their feelings or impressions are dead or cannot be found, &c., before evidence will be admitted of what any one of them said, is a question which may give rise to some difficulty. One of the leading cases on the subject now under notice was that of *Du Bost* v. *Beresford*.[1] Here the plaintiff painted a picture, which he designated "The Beauty and the Beast," and caused it to be exhibited for money, upon which crowds went to see it. The defendant went and hacked the picture to pieces. The plaintiff sued to recover the full value of the picture as a work of art, and compensation for the loss of the exhibition. The defendant alleged that the picture was a scandalous libel upon his brother and sister; and, in order to show whether the painting was made to represent these persons, the declarations of the spectators while looking at the picture in the exhibition, were admitted in evidence.[2] The question whether the evidence was admissible unless all the spectators were proved to be dead does not seem to have here arisen. Doubtless the difficulty, if not impossibility, of ascertaining the names of all the persons who expressed their feelings or impressions, and of calling them all as witnesses, will in the great majority of cases be held to occasion *an amount of delay or expense, which under the circumstances of the case will appear to the Court to be unreasonable.* Another instance of the admission of this kind of evidence was where, on a prosecution for conspiring to procure large meetings to assemble for the purpose of inspiring terror in the community, a witness was allowed to prove that several persons, who were not examined at the trial, had complained to him that they were alarmed at these meetings, and had requested him to send for military assistance.[3] So

[1] 2 Campbell's Reports, 511.

[2] This case is *Illustration* (*n*).

[3] See *Reg* v. *Vincent*, 9 Carrington and Payne's Reports, 275; *Redford* v. *Birley*, 8 Starkie's Nisi Prius Reports, 88.

reputation, the declarations of the neighbourhood as to their impression on the subject, has been received as evidence of marriage, though not in criminal cases, where stricter proof is required. In the case of the *Queen* v. *Wazira and another* (VIII B. L. R., Ap. 63), it was held that in a prosecution for enticing away a married woman under Section 498 of the Penal Code, evidence that a man and woman were living together is sufficient to raise the presumption that they are man and wife, and to throw upon the prisoner the burthen of proving that they were not married. It would, however, appear from the published report of this case that there was other and direct evidence of a marriage. The Indian Evidence Act, it will be observed, applies without distinction to civil and criminal cases.

In connection with the present section should be read Clause I of Section 21 (*ante*. p. 98). "An *admission* may be proved by or on behalf of the person making it when it is of such a nature that, if the person making it were dead, it would be relevant as between third persons under Section thirty-two." An exception to this rule may be found in Section 94 of the Bengal District Road Cess Act, X (B. C.) of 1871, which enacts that returns, filed by or on behalf of any person in pursuance of the provisions of that Act, shall be admissible in evidence against him, but *shall not be admissible in his favour*. A question may, however, arise as to whether this provision has not been repealed by the Indian Evidence Act, which was passed subsequently. *Leges posteriores priores contrarias abrogant.*]

Evidence in a former judicial proceeding when relevant.

33. Evidence given by a witness in a judicial proceeding, or before any person authorized by law to take it, is relevant for the purpose of proving, in a subsequent judicial proceeding, or in a later stage of the same judicial proceeding, the truth of the facts which it states, when the witness is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or if his presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the Court considers unreasonable :

Provided

that the proceeding was between the same parties or their representatives in interest ;

that the adverse party in the first proceeding had the right and opportunity to cross-examine;

that the questions in issue were substantially the same in the first as in the second proceeding.

Explanation.—A criminal trial or enquiry shall be deemed to be a proceeding between the prosecutor and the accused within the meaning of this section.

[The general rule, both in civil and criminal proceedings, is that the evidence of the witnesses must be taken *in the presence of* the parties or their pleaders. Witnesses are *examined* by the party who calls them, *cross-examined* by the adverse party, and *re-examined* by the former, if it be so desired (see Section 137, *post*). I shall show presently that there are some exceptions to this rule, and that the evidence of witnesses taken otherwise than in the presence of the parties is admissible under certain circumstances. The present Section is scarcely an exception, seeing that the evidence rendered admissible by it must have been given in a proceeding in which the adverse party was or might have been present, had he so desired. In order to the admissibility of the evidence it must be shown that the witness was examined on oath or solemn affirmation as required by the law for the time being in force (in connection with this, see Section 80, *post*); that the evidence was taken in a judicial proceeding or before a person authorized by law to take it (this can be generally proved by the production of the original record, and see Clause 7, Section 57, Section 80, and Exception 1, Section 91, *post*); and, *thirdly*, that the witness, whose deposition it is proposed to give in evidence, is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or that his presence cannot be obtained without an amount of delay and expense, which, under the circumstances of the case, the Court considers unreasonable. The burden of proving these facts lies on the person who wishes to give the evidence (see Section 104, *post*). Under English Law the evidence is admissible in civil cases when the witness is dead, or out of the jurisdiction of the Court, or not to be found after diligent search, or insane, or permanently sick, or kept out of the way by the contrivance of the opposite party. In criminal proceedings, however, a much stricter rule is applied, and the deposition of a witness taken before a Magistrate or Coroner will not be rendered admissible by mere proof that the witness himself cannot be found after diligent search. The above section of the Indian Evidence Act applies alike to civil and criminal proceedings. Here and elsewhere, when it is proposed to give in evidence the deposition or statement of a person said to be dead, it will be well to bear in mind the provisions of Sections 107 and 108, *post*. So much of the rule as admits the deposition of a witness kept out of the way by the adverse party is

Pre-requisites to Admissibility.

founded upon the broad principle of justice, which will not permit a person to take advantage of his own wrong.

Previous proceeding must have been between same parties or their privies.

The first proviso enacts that the previous proceeding in which the evidence was originally given must have been between the same parties or their representatives in interest. Heirs, assignees, lessees, administrators, and executors are representatives in interest; and there is no distinction between a person claiming under an execution-sale and a person claiming under an ordinary assignment or conveyance (*Raja Inayat Hosein* v. *Giridhari Lal*, II B. L R., P. C., 78; but see *Srimati Anund Mayi Dasi* v. *Dharandra Chundra Mukhapadya*, VIII B. L. R., P. C., 127). This rule depends upon the principle of reciprocity, it being reasonable that the right to use the evidence should be co-extensive with the liability to be bound thereby. It appears that it will make no difference that the parties are differently arrayed in the two proceedings—the plaintiff in the first proceeding being defendant in the second, or *vice versâ*. The application to criminal proceedings of so much of the rule as admits the evidence against *representatives in interest* may require some consideration.

Adverse party must have had right and opportunity to cross-examine.

The second proviso enacts that the adverse party in the first proceeding must have had the right and opportunity to cross-examine. This will prevent a co-defendant from using in a subsequent proceeding the evidence of a witness produced by another co-defendant. If the adverse party have had both the right and the opportunity to cross-examine, it will not effect the admissibility of the evidence that he did not chose to avail himself of this right and oportunity. If he had been permitted to cross-examine, where he had not the *right* to do so (see Section 165, *post*), it may be questionable if the evidence would be admissible.

Questions in issue must be substantially the same.

The third proviso enacts that the questions in issue must be substantially the same in the first as in the second proceeding. "If the point in issue," says Mr. Taylor, "though very similar, was so far different in the two proceedings, that the witness, who was called to prove or disprove the issue in the former, need not have been *fully* cross-examined in regard to the matters in controversy in the latter, his deposition, if tendered on the second trial, will be excluded; and on this ground it has been held (though, perhaps, with questionable propriety) that a deposition taken on a charge of assault could not afterwards be received on an indictment for wounding (§ 437)." Whether a deposition taken in a civil case would be admissible in a criminal case between the same parties or *vice versâ*, the section does not say in so many words, but the effect of the present proviso will be to exclude it in all but a few instances. Whether the questions in

issue are substantially the same in the first and second proceedings is a question which will occasionally require nice consideration. It may be an useful test in the great majority of cases to see whether the same evidence would or would not prove the affirmative of both.

Sections 249 and 328 of the Code of Criminal Procedure.

In connection with the *Explanation* should be read Section 249 of the Code of Criminal Procedure (Act X of 1872), which empowers the High Court or a Court of Session to refer to the evidence given before the committing Magistrate in the presence of the accused, and to ground its judgment thereon, although the witnesses may at the trial make statements inconsistent therewith; and also Section 323 of the same Code, under which the examination of a Civil Surgeon or other medical witness, taken and duly attested by a Magistrate, may be given in evidence in any criminal trial, although the person examined is not called as a witness. The Court may, however, summon such medical witness, if it sees sufficient cause for doing so. I have said above that there are some exceptional cases in which evidence is admitted against a person, although it has not been taken in his presence, and although he had no opportunity of cross-examining. These cases are, however, few in number, and depend wholly upon necessity. Under Section 325 of the Code of Criminal Procedure (Act X of 1872), any document purporting to be a report from the Chemical Examiner or Assistant Chemical Examiner to Government upon any matter or thing duly submitted to him for examination or analysis and report, in the course of any criminal trial, or in any preliminary inquiry relating thereto, may, if it bears his signature, be used as evidence in any criminal trial. The Court may presume that the signature of any such document is genuine and that the person signing it held the office which he professed to hold at the time when he signed it.

Report of Chemical Examiner.

Under the provisions of Section 327 of the same Code, if an accused person abscond, and after due pursuit cannot be arrested, any Court, competent to try or to commit such accused person for trial for the offence complained of, may, in his absence, record the statements of the persons acquainted with the facts; and such depositions may, on the arrest of such person, be put in on his trial for such offence, if it is not practicable to procure the attendance of such witnesses.

Record of evidence in the absence of the accused.

The examination of absent witnesses by commission is connected with the present subject. Under the provisions of Section 175 of the Code of Civil Procedure, Act VIII of 1859, when the evidence of a witness is required who is resident at some place distant *more than a hundred miles* from the place where the Court is held, or

Commissions to examine absent witnesses.

who is *unable from sickness or infirmity to attend* before the Court, or is a *person exempted by reason of rank* (see Section 22 of the same Code) *or sex from personal appearance* in Court: the Court may of its own motion, or on the application of any of the parties to the suit, or on the representation of the witness, order a commisson to issue for the examination of such witness on interrogatories or otherwise; and may, by the same or any subsequent order, give all such directions for taking such examinations as may appear reasonable and just. If the witness be resident within the jurisdiction of the Court which issues the commission, it may be directed to any officer of the Court, or to any Subordinate Court, or to any other person or persons whom the Court issuing the commission may think proper to appoint. If the witness reside out of the jurisdiction of the Court, and not within the local original jurisdiction of the High Court (in which case the commission shall ordinarily be directed to the Court of Small Causes held under Act IX of 1850), the commission shall be issued to the Court within whose jurisdiction the witness resides and which can *most conveniently execute the same.* It may, however, under special circumstances be directed to such other person as the Court thinks proper. If the witness be not resident within the jurisdiction of the High Court, but be resident within the British territories in India or within the territories of a Native Prince or State in alliance with the British Government, the Principal Court of a District, *if it be satisfied that such evidence is necessary*, may issue a commission in respect of any case pending before it, and, on the motion of a Subordinate Court, in respect of any case pending before such Subordinate Court (Section 177). If the witness be resident outside the territories last described, the commission can only be issued by the High Court, and it may be directed to such person or persons as that Court may think proper to appoint (Section 178). When the commission has been duly executed, it shall be returned (Section 179), together with the deposition of the witness who may have been examined thereunder, to the Court out of which the commission issued, unless otherwise directed by the order for issuing the commission. No deposition taken under a commission *shall be read in evidence without the consent of the party against whom the same may be offered, unless it be proved that the deponent is beyond the jurisdiction of the Court, or dead, or unable from sickness or infirmity to attend personally, or distant, without collusion, more than one hundred miles from the place where the Court is held, or exempted by reason of rank or sex from personal appearance in Court, or unless the Court shall at its discretion dispense with the proof of any of the above circumstances, or shall authorize the deposition of any witness being read in evidence notwithstanding proof that the causes for taking such deposition have ceased at the time of reading the same.* Although the Code of Civil Procedure does not

In Civil Cases.

expressly require notice of the issue of a commission to be given to the other side, yet such notice should always be given, lest the objection be raised that in consequence of the want of such notice there was not an opportunity of appearing before the Commissioner and cross-examining the witnesses. As to the practice when witnesses are examined under a commission issued by the High Court on its original side, see *Pran Kishna Chandra* v. *Biswanath Chandra and others*, VIII B. L. R., Ap. 101 (Attorney cannot cross-examine. Commissioner must be swown); *Dwarkunath Dutt* v. *Ganga Dayi and others*, VIII B. L. R. Ap. 102 (Use by one party of evidence taken under a commission issued at the instance of the other party).

Commission for Local Investigation.

Section 180 of the same Code enacts that in any suit or other judicial proceeding in which the Court may deem a local investigation to be requisite or proper for the purpose of elucidating the matters in dispute, or of ascertaining the amount of any mesne profits or damages, the Court may issue a commission to an officer of the Court appointed to execute such commissions, or, if there be no such officer, to any suitable person, directing him to make such investigation and to report thereon to the Court. In all such cases, unless otherwise directed by the order of appointment, the Commissioner shall have power to *examine any witnesses* who may be produced to him by the parties or any of them, the parties themselves, and any other persons whom he may think proper to call upon to give evidence in the matters referred to him; and also *to call for and examine documents and other papers* relevant to the subject of enquiry; and persons not attending on the requisition of the Commissioner, or refusing to give their testimony or to produce any documents or other papers, shall be subject to the like disadvantages, penalties, and punishments by order of the Court on the report of the Commissioner, as they would incur for the same offences in suits tried before the Court. The Commissioner, after such local inspection as he may deem necessary, and *after reducing to writing*, in the manner herein-before prescribed for taking the depositions of witnesses in the presence of the Judge *the depositions taken by him, shall return the depositions, together with his report in writing, subscribed with his name*, to the Court. *The report and depositions shall be taken as evidence* in the suit and shall form part of the record; but it shall be competent to the Court, or to the parties to the suit or any of them, with the permission of the Court, to examine the Commissioner personally in open Court touching any of the matters referred to him or mentioned in his report, or the manner in which he may have conducted the investigation.

Commissioner to investigate and adjust accounts.

Section 181 enacts that in any suit or other judicial proceeding in which an *investigation or adjustment of accounts* may be necessary, it shall be lawful for the Court to appiont such officer or other

person as aforesaid to be a Commissioner for the purpose of making such investigation or adjustment, and to direct that the parties or their attorneys or pleaders shall attend upon the Commissioner during such investigation or adjustment. In all such cases the Court shall furnish the Commissioner with such part of the proceedings and such detailed instructions as may appear necessary for his information and guidance: and the instructions shall distinctly specify whether the Commissioner is merely to transmit the proceedings which he may hold on the inquiry or else to report his own opinion on the point referred for his investigation. The proceedings of the Commissioner shall be received in evidence in the case, unless the Court may have reason to be dissatisfied with them, in which case the Court shall make such further inquiry as may be requisite, and shall pass such ultimate judgment or order as may appear to it to be right and proper in the circumstances of the case.

In the Bengal Presidency, Amíns or Native Commissioners employed under the provisions of Act XII of 1856 are usually deputed to make local investigations under the provisions of the above Section 180. The proper functions of an Amín appointed to make a local investigation will be found discussed in the following cases: *Ishwar Chandra Das* v. *Jagal Kishor Chakravartti*, IV B. L. R., Ap. 33; *Sarat Chandra Rai Kanungo* v. *The Collector of Chittagong*, II B. L. R., Ap. 3; *Gobind Chandra* v. *Rabutti Mani Chaudrain*, II Sevestre's Rep., 210; *Ram Churn Mahtún and others* v. *Sarabjít Mahtún and others*, IX W. R., 494; *Ambika Churn Dé and others* v. *Goluk Chandra Chakravartti*, IX W. R., 596; *Bheirab Rai and another* v. *Nobin Raí and others*, XI W. R. 601; *Goluk Chandra Kúl* v. *Dúkhí Ram*, XII W. R. 39. The depositions of the witnesses examined by the Amín without his report will not be admissible in evidence (*Debnarain Deb* v. *Kali Das Mitter*, VI B. L. R., Ap. 70). The fact that a witness might be examined by commission under the provisions just noticed would seem to be no bar to the admission of his evidence under Section 33 of the Indian Evidence Act.

The examination of witnesses by commission in criminal proceedings in India is provided for by Section 330 of the Code of Criminal Procedure, Act X of 1872, which enacts as follows:—

When a Commission may issue in Criminal Cases.

"Whenever it appears that the attendance of a witness cannot "be procured without an amount of delay, "expense, or inconvenience, which, under the "circumstances of the case would be unrea-"sonable, it shall be competent to a Court of Session or to a High "Court to dispense with the personal attendance of such witness.

Mode of issuing Commission.

"Such Court of Session or High Court may direct a commission "to the Magistrate of the District, or to a "Magistrate of the 1st class, in whose jurisdic-"tion such witness may be. The Magistrate

"to whom the commission is directed shall proceed to the place where "such witness is, or shall summon such witness before himself. Such "Magistrate shall take the evidence of such witness in the same man-"ner, and shall have for this purpose and may exercise the same "powers, as in trials of warrant cases.

Prosecutor and accused may examine witness.

"The prosecutor and the accused person may forward interrogatories "to which the officer to whom the commission "is directed shall cause a return to be made, "or the prosecutor may appear personally "before the Magistrate to whom the commission is directed, or the "prosecutor or accused person may so appear by authorized agent.

Procedure when Commission is required in Magistrates' cases.

"Whenever, in the course of a trial before a Magistrate, it shall ap-"pear that a commission ought to be issued "for the examination of a witness whose evi-"dence is necessary in such trial, such Magis-"trate shall apply to the Court of Session, to "which he is subordinate, stating the reasons for the application; and "such Court may either issue a commission in the manner herein-"before provided, or may reject the application."

Cases connected with Merchant Seamen, &c. Section 111 Act I of 1859.

Under the provisions of Section 111 of Act I of 1859 (*An Act for the amendment of the Law Relating to Merchant Seamen*), depositions made *in relation to the same subject-matter*, before any Justice or Magistrate in Her Majesty's dominions (including all parts of India other than those subject to the same Local Government as the port or place where such proceedings are instituted), or any British Consular Officer *elsewhere* are, if authenticated by the signature of the Justice, Magistrate, or Consular Officer, declared to be admissible in evidence on due proof that such witness cannot be found within the jurisdiction of the Court: provided that, if the proceeding be criminal, such deposition shall not be admissible unless it was made in the presence of the person accused, and the fact that it was so made is certified by the Justice, Magistrate, or Consular Officer; of whose signature or official character, however, no proof is to be required.

Sections 10 and 14, Act XI of 1872.

In inquiries and trials under the *Foreign Jurisdiction and Extradition Act, XI of* 1872, the Local Government may, if it thinks fit, direct that copies of depositions made or exhibits produced before the Political Agent or a Judicial Officer in the State in which such offence is alleged to have been committed, shall be received as evidence by the Court holding such inquiry or trial, in any case in which such Court might issue a commission for taking evidence as to the matters to which such depositions or exhibits relate. (See Sections 10 and 14 of Act XI of 1872.)

In proceedings under *The Extradition Act*, 1870, 33 & 34 Vict., Cap. 52, depositions or statements on oath, taken in a Foreign State, and copies of such original depositions or statements may, if duly authenticated, be received in evidence: and they shall be deemed to be duly authenticated, if authenticated in manner provided for the time being by law, or certified under the hand of a Judge, Magistrate, or officer of the Foreign State where the same were taken to be the original depositions or statements or to be true copies thereof, as the case may require, and if authenticated by the oath of some witness, or by being sealed with the official seal of the Minister of Justice, or some other Minister of State. And all Courts of Justice, Justices, and Magistrates shall take judicial notice of such official seal, and shall admit the documents so authenticated by it to be received in evidence without further proof.

33 & 34 Vict., Cap. 52, Sections 14, 15, and 24.

Under the provisions of the 13 Geo. 3, Cap. 63, any Governor-General, President, Governor, Chief Justice, Judge, or other person in the Civil or Military Service in India may be tried before the Court of Queen's Bench for any offence committed in India;[1] and the Court of Queen's Bench may award a writ of *mandamus* requiring the Chief Justice and Judges of the Supreme (High) Court in India to hold a court for the examination of witnesses and receiving other proofs concerning the matters charged. The examination of witnesses is to be taken *vivâ voce* in open court, and is to be reduced to writing, and shall be sent to the Court of Queen's Bench, closed up and under the seals of two or more of the Judges. The agent of the party may take delivery of the packet, and shall deliver the same to one of the clerks of the Court of Queen's Beuch, and make oath that he received the same from the hands of one or more of the Judges in India, and that the same has not been altered or opened since he received it. Depositions so taken and returned shall be allowed and read, and shall be deemed as good and competent evidence as if the witnesses had been present and sworn and examined *vivâ voce* at a trial in the Court of Queen's Bench, any law or usage to the contrary notwithstanding (Section 40). If the charge be against the Chief Justice or any of the Judges, the *mandamus* will go to the Governor-General in Council (Section 41). Under the 42nd Section, in all cases of proceedings in Parliament touching offences committed in India, it shall be lawful for the Lord High Chancellor or Speaker of the House of Lords, and also for the Speaker of the House of Commons, to issue his warrant for the examination of witnesses in the manner just described; and the depositions so taken and returned shall be good and competent evidence,

13 Geo. 3, Cap. 63, Sections 39, 40, 41, 42, 44, 45.

[1] See also 10 Geo. 3, Cap. 47, Sec. 4; 26 Geo. 3, Cap. 57, Sec. 25; and 42 Geo. 3, Cap. 85.

and shall be allowed and read in the House. Such depositions are not, however, to be allowed to be given in evidence in any capital cases other than such as shall be proceeded against in Parliament (Section 45). Under the 44th Section similar writs of *mandamus* may be awarded by the Courts at Westminster in suits both in law and equity, the cause of action in which has arisen in India.

21 Geo. 3, Cap. 70, Sections 5 and 6.

These provisions are by the 21 Geo. 3, Cap. 70, Sec. 5, extended to the case of any person making a complaint to the Supreme (High) Court against the Governor-General of any oppression or injury, and entering into a bond to prosecute the same within two years in some competent Court in Great Britain.

24 Geo. 3, Cap. 25, Section 78.

Similar provisions are contained in the 24 Geo. 3, Cap. 25, which provides for the trial before Special Commissioners of British subjects holding offices or employments in India and charged with extortion or other misdemeanour committed in the East Indies.

42 Geo. 3, Cap 85, Section 2.

Under the 42nd Geo. 3, Cap 85, which provides for the trying and punishing in Great Britain persons holding public employment for offences committed abroad, the Court of Queen's Bench is empowered to award similar writs of *mandamus* for the taking of evidence, and the return of the same to any Chief Justice and Judges, or any Chief Justice or other Judge, singly for the time being, of any Court or Courts of Judicature in the country or near to the place where the crime, offence, or misdemeanour shall be charged in the indictment or information to have been committed, or to any Governor or Lieutenant-Governor or other person having any chief authority in such country or to any other person or persons residing there.

1 Geo. 4, Cap. 101.

The 1st Geo. 4, Cap 101, provides for the issue of his warrant by the Speaker of either House of Parliament to the Judges of the Supreme (High) Courts for the examination of witnesses in India in cases of bills of divorce; and declares to be competent and admissible evidence in such cases the examination of witnesses taken and returned under the provisions of the Statute. (As to divorce cases see also *post*, p. 152.)

6 & 7. Vict., Cap. 98.

The 6th & 7th Vict., Cap. 98, passed for the more effectual suppression of the slave trade, extends the above provisions of the 13th Geo. 3, Cap. 63, to all cases of indictment or information laid or exhibited in the Court of Queen's Bench for misdemeanours or offences committed against the Acts for the abolition of the slave trade, in any places out of the United Kingdom and within any British colony, settlement, plantation, or territory.

The 14th & 15th Vict., Cap. 81, which empowers the Supreme (High) Courts at the Presidencies to direct the removal from India of lunatics and idiots, when a guardian, keeper, or curator of any such lunatic or idiot has been appointed, declares it lawful for the proper officer of the Court to transmit a transcript, under the hand and seal of the Chief Justice or Senior Judge, of the *proceedings* by which the idiotcy, lunacy, or unsoundness of mind shall have been found, and by which such guardian, keeper, or curator shall have been appointed to the Chancery in England and the Court of Session in Scotland and Chancery of Ireland respectively, as the case may require, and such transcript when so received shall be entered of record in the Court to which it may have been transmitted; and the record of any such proceedings shall, so far as the Lord Chancellor or Court of Session shall see fit, have the same force and effect, as if such proceedings had taken place in England, Scotland, or Ireland, respectively.

14 & 15 Vict., Cap 81, Section 6.

Under the provisions of the *Chinese Passengers Act*, 1855, any document purporting to be the written declaration of any British Consul or of the Commander of any of Her Majesty's ships of war, or to be a copy of the proceedings of any Court of Justice, shall, without any proof of signature, be received in evidence in legal proceedings taken under the Act or in respect of the bond therein required, if it appear that such copy or declaration, if produced in the United Kingdom, was officially transmitted to one of Her Majesty's Principal Secretaries of State, or, if produced in any colony, was officially transmitted to the Governor thereof.

18 & 19 Vict., Cap. 104, Section 15.

The 19th and 20th Vict., Cap. 113, entitled *an Act to provide for taking evidence in Her Majesty's dominions in relation to civil and commercial matters pending before foreign tribunals*, enacts that, where, upon an application for this purpose, it is made to appear to any Court or Judge, having authority under this Act, that any Court or tribunal of competent jurisdiction in a foreign country, before which any civil or commercial matter is pending, is desirous of obtaining the testimony in relation to such matter of any witness or witnesses within the jurisdiction of such first-mentioned Court, or of the Court to which such Judge belongs, or of such Judge, it shall be lawful for such Court or Judge to order the examination upon oath, upon interrogatories or otherwise, before any person or persons named in such order, of such witness or witnesses accordingly; and power is given to enforce their attendance as also the production of writings or other documents. A certificate under the hand of the Ambassador, Minister, or other diplomatic agent of any Foreign Power, or, in case there be no such diplomatic agent, then of the Consul-General or Consul of any such foreign power at London, that any matter in relation to which

19 & 20 Vict., Cap. 113.

an application is made under the Act is a civil or commercial matter pending before a Court or tribunal in the country of which he is the diplomatic Agent or Consul, and that such Court or tribunal is desirous of obtaining the testimony of the witness or witnesses to whom the application relates, shall be evidence of the matters so certified; but where no such certificate is produced, other evidence to that effect shall be admissible. Her Majesty's Superior Courts of Common Law at Westminster and in Dublin, and the Court of Session in Scotland, and any Supreme Court in any of Her Majesty's colonies or possessions abroad, and any Judge of any such Court, and every Judge in any such colony or possession, who by any order of Her Majesty in Council may be appointed for this purpose, are declared, respectively, to be Courts and Judges having authority under the Act. By the 24th Section of the *Extradition Act*, 1870, 33 & 34 Vict., Cap. 52, the testimony of any witness may be obtained in relation to any criminal matter pending in any Court or tribunal in a Foreign State in like manner as it may be obtained in relation to any civil matter under the Statute above first referred to: provided, however, that this provision shall not apply to any criminal matter of a political character.

33 & 34, Vict., Cap. 52, Section 24.

The 22nd Vict., Cap. 20, entitled *an Act to provide for taking evidence in suits and proceedings pending before tribunals in Her Majesty's dominions in places out of the jurisdiction of such tribunals*, enacts that, where, upon an application for this purpose it is made to appear to any Court or Judge having authority under this Act that any Court or tribunal of competent jurisdiction in Her Majesty's dominions, has duly authorized, by commission, order, or other process, the obtaining the testimony in or in relation to any action, suit, or proceeding pending in or before such Court or tribunal of any witness or witnesses out of the jurisdiction of such Court or tribunal, and within the jurisdiction of such first-mentioned Court, or of the Court to which such Judge belongs, or of such Judge, it shall be lawful for such Court or Judge to order the examination before the person or persons appointed, and in manner and form directed by such commission, order, or other process as aforesaid, of such witness or witnesses accordingly: and power is given to enforce the attendance of witnesses as also the production of documents. This Statute contains other provisions similar to those of the 19th and 20th Vict., Cap. 113, and the same Courts and Judges are declared to have authority under both enactments.

22 Vict., Cap. 20.

The preamble to the 6 & 7 Vict., Cap. 94, recites that, whereas by treaty, capitulation, grant, usage, sufferance, and other lawful means, Her Majesty hath power and jurisdiction within divers countries and places out of Her Majesty's dominions; and whereas

6 & 7 Vict., Cap. 94, Section 3.

doubts have arisen how far the exercise of such power and jurisdiction is controlled by and dependent on the laws and customs of this realm, and it is expedient that such doubts be removed: and then proceeds to enact that the power acquired by Her Majesty in countries out of her dominions shall be held on the same terms as Her Majesty's authority in the crown colonies; and that acts done in pursuance of such power shall be of the same effect as if done under local laws. Section 3 then provides, that if in any suit or other proceeding, whether civil or criminal, in any Court ecclesiastical or temporal, within Her Majesty's dominions, any issue or question of law or of fact shall arise, for the due determination whereof it shall, in the opinion of the Judge or Judges of such Court, be necessary to produce evidence of the existence of any such power or jurisdiction as aforesaid, or of the extent thereof, it shall be lawful for the Judge or Judges of any such Court to transmit under his or their hand and seal or hands and seals, to one of Her Majesty's Principal Secretaries of State questions by him or them properly framed respecting such of the matters aforesaid as it may be necessary to ascertain in order to the due determination of any such issue or question as aforesaid; and such Secretary of State is empowered and required within a reasonable time to cause proper and sufficient answers to be returned to all such questions; and to be directed to the said Judge or Judges or their successors; and such answers shall on production thereof be final and conclusive evidence in such suit or other proceedings of the several matters therein contained and required to be ascertained thereby. Section 4 empowers any person having authority from Her Majesty in that behalf by warrant under his hand and seal to cause any person charged with the commission of any crime or offence cognizable by any Judge, Magistrate, or other officer within any such country or place as aforesaid (*i. e.*, out of Her Majesty's dominions), to be sent for trial to any *British colony* (This includes British India; see 28 & 29 Vict., Cap. 116) which Her Majesty may by an order in Council from time to time appoint: *provided* that before any such person shall be so sent for trial it shall be lawful for him to tender for examination to the Judge, Magistrate, or other officer having cognizance, *any competent witness or witnesses, the evidence of whom he may deem material for his defence, and whom he may allege himself to be unable to produce at his trial* in the said colony; and the said Judge, Magistrate, &c., shall examine the witness or witnesses and reduce the examination to writing, and shall transmit a copy thereof to the Supreme Court before which the trial is to take place, together with a certificate under his hand and seal of the correctness of such copy; and the Supreme Court is required to allow so much of the evidence so taken as would be admissible according to the law and practice of the Court, had the witness or witnesses been produced and

6 & 7, Vict., Cap. 94, Section 4.

examined at the trial before it, to be read and received as legal evidence at such trial.

The 20th and 21st Vict., Cap. 85, Section 47, confers upon the Court for Divorce and Matrimonial Causes, created thereby, all the powers given to the Courts of Law at Westminster by the provisions of of the 13th Geo. 3, Cap. 63, for enabling them to issue commissions and give orders for the examination of witnesses, and all the provisions of any other Acts for enforcing or otherwise applicable to such examination and the witnesses examined.]

20 & 21 Vict., Cap. 85, Section 47.

STATEMENTS MADE UNDER SPECIAL CIRCUMSTANCES.

Entries in books of account when relevant.

34. Entries in books of account, regularly kept in the course of business, are relevant whenever they refer to a matter into which the Court has to inquire, but such statements shall not alone be sufficient evidence to charge any person with liability.

Illustration.

A sues B for Rs. 1,000 and shows entries in his account books showing B to be indebted to him to this amount. The entries are relevant, but are not sufficient without other evidence to prove the debt.

[As a general rule, books of account are inadmissible in evidence in English Courts of Common Law, except in the particular cases of entries *against interest* or made in the *course of business* by persons dead and incapable of being called as witnesses. A different rule prevails in other countries; and even in England a tradesman's shop-book was in old times admissible as evidence on his behalf. In America, entries made by the party himself in his own shop-books are admissible if made contemporaneously with the facts to which they refer, and forming part of the *res gestæ*. Under Roman law, the production of a merchant's or tradesman's account-books, regularly and fairly kept in the usual manner, was deemed to afford presumptive evidence of the justice of the claim. A similar principle has been followed out in the laws of France and Scotland; and Mr. Taylor strongly recommends its adoption in English Courts of Common Law. It has been long admitted and acted upon in Courts of Equity. The Chancery Practice Amendment Act (15 & 16 Vict., Cap. 86, § 54) empowers such Courts "in cases where they shall think fit so to do, to direct that, in taking accounts, the books of accounts in which the accounts required to be taken had been kept or any of them shall be taken as *primâ facie*

evidence of the truth of the matters therein contained, with liberty to the parties interested to take such objections thereto as they may be advised."

The section (43) of the old Act, II of 1855, ran thus:—"Books *proved* to have been regularly kept in the course of business shall be admissible as *corroborative*, but not as independent proof of the facts stated therein." The above section of the Indian Evidence Act substitutes "regularly kept" for "proved to have been regularly kept." This taken with the language of the illustration "shows" (not proves) "entries" might seem to indicate it as the intention of the Legislature that the principle of the section just quoted from the 15 & 16 Vict., Cap. 86, is to be followed. So much of the rule as declares that entries in books of account shall not alone be sufficient to charge any person with liability, follows the Roman law under which such entries were deemed *semi-plena probatio*, the suppletory oath of the party being admitted to make up the *plena probatio* (full proof) necessary to obtain a decree. For the practical application of this rule in India, see the following cases:—*Rai Srí Kishen* v. *Rai Harí Kishen*, V Moo. Ind. Ap. 432; *Seth Lakhmí Chand and others* v. *Seth Indra Mull and others*, IV B. L. R., P. C 31; *Dwarka Dass and others* v. *Dwarka Das*, III N. W. P. Rep. 308; *Allyat Chinaman* v. *Jagat Chandra Rai and another*, V W. R. 242; *Gopal Mandal and others* v. *Nobo Kishen Múkapadya*, V W. R., Act X, Rulings, 83; *Sorabjí Vacha Ganda* v. *Kunwarjí Manikjí*, 1 Moo. Ind. Ap., 47. In this last case their Lordships of the Privy Council said:—

"No evidence was brought before the Provincial Court or the Court of Sádr Diwaní Adálat, which was not before the Zillah Court; so that the decress can only be supported by holding that one party, by merely producing his own books of account, can bind the other. But such a proposition is utterly untenable."

Jamá-Wasíl-Bakí.

It may be useful to mention some of the books of account which are produced before the Courts in India, and which have formed the subject of judicial decision. In cases between landlord and tenant, and in suits for *wasilât* or *mesne* profits, *jamá-wasíl-bakí* [1] accounts are usually offered in evidence. The decisions are not, however, altogether uniform as to the value which ought to be assigned to these papers.

In the case of *Allyat Chinaman* v. *Jagat Chandra Rai and another* (V W. R. Civ. Rul. 242), the Calcutta High Court (Phear and Glover, JJ.), remarked as follows:—"But it is contended that their allegations are corroborated by the *jamá-wasíl-bakí* papers filed by the respondent, in which the names of these ryots are entered. Now, we

[1] The reader will find in Appendix I a description of this account and of the system of which it forms a portion.

observe that such a document, a private memorandum made for the zemindar's own use, and by his own servants, must be looked upon with great suspicion, for nothing could be easier in a case like the present than to supplement defective oral evidence by the production of a document which could be manufactured at any time, and to any required pattern. *Has then this document been attested?* We think not. Doubtless a person calling himself a Karkoon's Mohurrir has been produced to depose to Isshur Chunder the Tehsildar's signature to this particular paper, but the Tehsildar himself has not been examined, and it is not pretended that the man is either dead or unable to depose. The best evidence was required to prove a document so naturally open to suspicion and that evidence has not been given." In the case of *Khíra Maní Dasya and others* v. *Bejai Gobínd Baral and others* (VII W. R., Civ. Rul. 533), Norman, J., referring to this case, said:—"As to the value of *Jamá-wásíl-bakí* papers as evidence in rent suits for the zemindar, the Deputy Collector quotes a passage from the 5th volume of the Weekly Reporter, page 243, and treats it as if the language applied to all *jamá-wásíl-bakís*. But there is a wide distinction between the case with which the learned Judges were then dealing, and to which they apply their remarks, and the present. Here we have a series of *jamá-wásíl-bakís* apparently regularly kept for ten years, with one gap, from 1249 to 1258. There is a single paper unattested, the writer of which was not called and his absence not accounted for. Of course, all books of account and entries made by or on behalf of a party when produced as evidence in his favour must be received with caution; but there seems to be no reason why a series of collective accounts, or *jamá-wasíl-bakí* papers, appearing to be regularly kept, should not be entitled to credit on the same principle as other contemporary records made and kept by the party producing them in the ordinary course of his business."

In the case of *Gopal Mandal aad others* v. *Nobo Kishn Múkapadya* (V W. R., Act X, Rulings, p. 83), Seton-Karr, J. (Macpherson, J. concurring) said: "The Judge (of the Lower Court) alludes to the evidence of the gomashtahs who filed or attested certain papers of the zemindar. Such papers, we need hardly observe, cannot *incontestibly* prove variations in a ryot's jumma *unless it can be shown not merely that the jamá-wásíl-bakí and similar papers show a varying rate, but that the ryot has paid at a varying rate.*[1] Otherwise every ryot would be at the mercy of a zemindar or his agents. The Judge says that the witnesses attest these papers, but he does not say how he considers the ryots bound by them,"—but see *Sib Persád Dhobí* v. *Promothonath Ghose and others* (X W. R., 193). In the case of *Ram Lal Chakravarttí and another* v.

[1] The fact of the rent having been paid at a *varying rate* was the fact sought to be proved by these papers in order to rebut the presumption in favour of a permanent tenure created by Section 4, Act X of 1859. See also Sections 4, and 17, Act VIII (B. C.) of 1869.

Tara Sundari Burmanya, VIII W. R. Civ. Rul. 280, the same Judge said: "*Jamá-wasíl-baki* papers ought not to be regarded as anything else than 'books proved to have been regularly kept in the course of business,' and these books, by Section 43 of Act II of 1855, are 'admissible as *corroborative* but not as *independent* proof of the facts stated therein.' But in this case there is no independent proof adduced by the plaintiff of that which it was incumbent on him to prove in order to rebut the presumption found in favour of the defendant, and the *jamá-wásil-baki* papers consequently corroborate nothing, nor was the Judge legally justified in drawing from them the conclusions which he did draw." See, to the same effect, *Sheik Newazi and others* v. *Lloyd*, VIII W. R. Civ. Rul. 464; and *Bijai Gobind Burral and others* v. *Bhiki Rai*, X W. R. 291. In *Sheo Sahai Rai and others* v. *Gudar Rai and others* (VIII W. R. Civ. Rul. 328), L. S. Jackson, J., said: "It may be observed that *jamá-wasíl-baki* papers in a case of this kind" (suit for possession on the allegation of wrongful dispossession) "are really of very little consequence or value, as it is a matter of perfect ease for either party in the suit to produce any number of such papers. It is even doubtful whether, under the terms of Section 43, Act II of 1855, *jámá-wasíl-baki* papers would be admissible even as corroborative evidence strictly speaking; certainly they are not independent evidence of any kind whatever, and therefore the absence of particular papers of that kind does not appear to be a very material omission." See also as to *jamá-wasíl-baki* papers, *Gholam Muhammud Shah* v. *Banjuri Cheragi*, 7th August, 1847, S. D. A. Decis., Beng., 403.

Jai-baki papers brought from the plaintiff's own possession cannot be used against a defendant without showing that he has in some way agreed to them. (*Beidonath Parúya* v. *Rassik Lal Mittra*, IX W. R. 274.) "*Jamá-bandi* papers may be only used as corroborative evidence, *viz.*, of the same value as that which is attached to books of account under Section 43, Act II of 1855. These papers were admittedly prepared by the zemindar's own agent in the absence of the *ryots;* and if the mere fact of the agent coming forward to swear that he wrote the papers is to justify a Court in accepting every fact recited therein as true against the ryots, no ryot in this country would be safe." *Gajjo Koer and others* v. *Syud Alay Ahmed*, VI B. L. R. Ap. 62,—to the same effect, *Chamarni Bibi* v. *Ayanúla Sirdar and others*, IX W. R. 451, and *Naolas Kunwar* v. *Múnshi Shiva Sahai*, I N. W. Rep. Rev. Ap. 65. *Ism-Navisi* papers prepared in the ordinary course of business under the provisions of Bengal Regulations XVII, X, and XII of 1807, are admissible in evidence, and may be entitled to some weight. They ought probably to be regarded as corroborative but not as independent evidence (*Fergusson* v. *The Government and another*, V R. C. and C. R., Civ. Rul. 179, and IX W. R., 150; *Farquharson*, v. *Dwarkanath Singh and the Government of India*, before the Privy

Council on the 4th July, 1871, VIII B. L R. 504:—see also *Erskine* v. *The Government and others*, VIII W. R. Civ. Rul. 232. Settlement *beheri* and *awargha* papers are corroborative evidence and nothing more (*Banwari Lal* v. *Forlong*, IX W. R., 239). As to *hastabûd* papers, see *Ram Narsingh Mittra* v. *Tripúra Sundarí Dasya and others*, IX W. R. 105. As to *Kanungo* papers, see *Khíro Maní Dasya and others* v. *Bíjai Gobind Baral and others*, VII W. R. Civ. Rul. 533, and *Nand Danpat* v. *Tara Chand Prithi-barí*, II W. R., Act X, Rul. 13. As to a *hath-chittá* book being *primâ facie* binding upon the vendor, for whose security it is kept, see *Gopî Mohun Rai* v. *Abdúl Rájá Sarjan Nakoda*, I Jur. N. S., 358.

The following cases may also be consulted in connection with the use of account-books in evidence in India, *viz.*, *Har Gobind Kadwasa* v. *Mohidín Kuli Khan*, 23rd November, 1843, Bellasis' Rep. 48 (Proof of debt by account-books): *Sardha Narain Rai* v. *Sohan Lal and another*, 8th Feb., 1847, S. D. A., Decis., Beng., 45 (Accounts not at first produced and not supported by vouchers): *Ramgopal Mukapadya* v. *Rodgers and others*, 20th March, 1847, S. D. A., Decis., Beng., 83: *Birjomohun Chaudhrí* v. *Chandra Maní Saha and others*, 6th Jan. 1848, 7, S. D. A. Rep., 423 (Mercantile accounts received for what they were worth, though neither signed nor attested);—to the same effect *Joalah Persad* v. *Mahamed Sâdat Ali and others*, 1st May, 1848, 3, Decis. N. W. P., 130: *Ram Sahai Bhaggat and others* v. *Aodan Bhaggat*, 16th February, 1848, S. D. A., Decis. Beng., 83 (*Khatas* must be verified): *Tulsiram and another* v. *Rájá Khusal Singh and another*, 24th Dec. 1848, 4, Decis., N.-W. P. 337: *Ishan Chandra Singh* v. *Haran Sirdar and others*, III B. L. R. 135 (A Judge is bound to look at the whole of the entries, those on the credit and those on the debit side, to give credit to such of them as he believes to be true and to discredit those, if any, which he believes to be false): *Shah Gholam Nasaf* v. *Mussamat Emanam and others*, IX W. R. Civ. Rul. 275: (Income-tax papers held admissible against but not in favour of the person whom they concerned): *Raní Durga Sundarí* v. *Brindabun Chandra Sirkar Chaudhrí and another*, II B. L. R. Ap. 37 (Lowazima papers): *Dwarka Dass* v. *Babú Janki Dass*, VIII Moo. In. Ap. 88.

In connection with the subject of the use of account-books in evidence, the following extract from a Circular Order of the Calcutta High Court is important:—

"The Court find it absolutely necessary to call the attention of subordinate Courts of every grade to the Sections of the Code of Civil Procedure applicable to the reception of documentary evidence, the laxity of practice prevailing on this head being productive of most serious inconvenience, and evincing in many cases total disregard of the wholesome provisions of the law.

Section 39 (of the Code of Civil Procedure) provides that "when the "plaintiff sues upon any written document, or relies upon any such

"document as evidence in support of his claim, he shall *produce the* "*same in Court* when the plaint is presented, and shall *at the same time* "*deliver a copy* of the document *to be filed with the plaint:* if the docu- "ment be an entry in a shop-book or other book, the plaintiff shall pro- "duce the book to the Court, together with a *copy of the entry* on which "he relies. The Court shall forthwith mark the document..... "and after examining and comparing the copy with the original, shall "return the document to the plaintiff. The plaintiff may, if he think "proper, deliver the original document to be filed instead of the copy "..... Any *document not produced in Court* by the plaintiff when "the plaint is presented, *shall not be received in evidence* on his behalf "at the hearing of the suit, without the sanction of the Court."

This latter part of the Section has reference to Section 128, which regulates the reception of documents at the first hearing, and is in these words:—

"The parties or their pleaders shall bring with them, and have in "readiness at the first hearing of the suit, to be produced when called "upon by the Court, all their documentary evidence of every description, "which may not already have been specified in any notice which may "have been served on them respectively within a reasonable time before "the hearing of the suit; and no documentary evidence of any kind, "which parties or any of them may desire to produce, shall be received "by the Court at any subsequent stage of the proceedings, unless good "cause be shown to its satisfaction for the non-production thereof at "the first hearing."....

Section 132, it will be observed, repeats the direction contained in Section 39, that if the exhibit (or document) be an entry in any shop-book, or other book, the party on whose behalf such book is produced shall produce *a copy of the entry, which copy shall be endorsed,* as aforesaid, and be filed as part of the record, *and the book shall be returned* to the party producing it, and the Court ought, doubtless, in these cases as under Section 39, to *mark* the document, *i. e.*, the entry in the book for the purpose of identification before returning it.

It will be observed that the words as to the return of the book are imperative, and the party has not the option (as under Section 39) of delivering the book to be filed, instead of the copy of the entry.

From inattention to this rule, it has been matter of frequent occurrence for great numbers of account and other books to be received and actually filed in the subordinate Courts, and to be afterwards sent up to the Appellate Courts, to the serious inconvenience of the Courts themselves, and probably of the parties, except in those cases where the books have been prepared *pro re natâ*, a thing which occasionally happens.

But the inconvenience reaches a climax when the importance of the suit and the determination of the parties bring about an appeal to Eng-

land. It then becomes *primâ facie* necessary to translate and to print the whole of the contents of these voluminous books and other papers, and the resulting costs are frequently enormous.

This Court is occasionally, at very great trouble to itself and to the pleaders engaged, able to apply some check to the evil, but in many instances the check has not been applied, and in consequence the Lords of the Judicial Committee of the Privy Council have in several instances made complaints and observations upon the nature of the evidence sent home from this country.

The answer of this Court on these occasions has been, that the evil is one with which the Appellate Courts can but imperfectly cope, and the effectual remedy must be applied in the Courts of first instance.

And it is very much with a view to obviate these particular complaints and to remove this just reproach from the procedure of the Courts in India, that these instructions are issued.[1]]

Entry in public record, made in performance of duty enjoined by law, when relevant.

35. An entry in any public or other official book, register, or record, stating a fact in issue or relevant fact and made by a public servant in the discharge of his official duty, or by any other person in performance of a duty specially enjoined by the law of the country in which such book, register, or record is kept, is itself a relevant fact.

[Mr. Taylor, speaking of *official registers* or books kept by persons in public offices, in which they are required, whether by statute or by the nature of their office, to write down particular transactions, occurring in the course of their public duties, and under their personal observation, observes as follows, quoting from Starkie:—"These documents, as well as all others of a public nature, are generally admissible in evidence, although their authenticity be not confirmed by the usual tests of truth, namely, the swearing and the cross-examining of the persons who prepared them. They are entitled to this extraordinary degree of confidence, partly because they are required by the law to be kept, partly because their contents are of public interest and notoriety, but principally because they are made under sanction of an oath of office or at least under that of official duty, by accredited agents appointed for that purpose. Moreover, as the facts stated in their entries are of a public nature, it would often be difficult to prove them by means of sworn witnesses." (§ 1429.) "To render any document admissible in

[1] See Circular Order No. 9, dated 26th February, 1867, p. 189, of the First Volume of the Author's "General Rules and Circular Orders."

evidence as an *Official Register*, it must be one which *the law requires to be kept for the public benefit.*" (§. 1430.) Lord Denman rejected the Register of Shipping kept at Lloyd's as not falling within this rule; but this register has been admitted in other cases.

The following registers have been rejected:—A certificate filed at the Custom-House which was signed by a party who certified that he had measured the vessel, and stated the amount of the tonnage; registers of the Baptisms and Marriages performed at the Fleet and King's Bench prisons, at May Fair, and at the Mint in Southwark; a Jewish Register of Circumcisions kept at the great synagogue in London, &c. The Registers of Burials and Baptisms maintained by the English clergy, and in their absence by laymen at the stations in India, may, perhaps, be admissible, though they are not prescribed by any law, and the maintenance of them is scarcely an official act.[1] Where these registers are prescribed by local Municipal Acts, there can be no question of their being admissible. *Foreign* and *colonial registers* are receivable in England on proof that they are required to be kept, either by the law of the country to which they belong or by the law of England.

The above section of the Indian Evidence Act follows the English law pretty closely. The book, register, or record must be either a *public* or an *official* one. The Act does not contain any definition of these terms, but in putting an interpretation on them reference may be made to Sections 74 and 78, *post.* Again, the entry must have been made by a *public servant in the discharge of his official duty*, or by any other person in performance of a duty specially enjoined by the law of the country in which such book, register, or record is kept. The Act contains no definition of the term "*public servant*," but see, as aids to construction, the definition given in Section 21 of the Indian Penal Code (Act XLV of 1860), and Section 2 of the Railway Servants' Act, XXXI of 1867. It is not necessary to the admissibility of an entry made by a public servant in the discharge of his official duty, that the register, &c., should be prescribed by law. The Codes of Civil and Criminal Procedure, the Revenue Laws and other enactments empower the High Courts, Boards of Revenue, and other controlling authorities to prescribe forms for Registers, Returns, &c. It may be said that such registers are really prescribed by law inasmuch as they are directed in the exercise of authority conferred by law; but it may well be held to be the official duty of a public servant to maintain registers directed by his superiors without any such formal legal authority. In the case of persons *other than public servants*, however, the duty must be specially enjoined by the law of

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[1] See as to the books of baptisms, marriages, and burials in India, deposited at the office of the Secretary of State, *Ratcliff* v. *Ratcliff and Anderson.*, 1 Swabey and Tristram's Reports, 467, and the Report of 1838 of the Commissioners for an Inquiry into the state of Non-parochial Registers, p. 13.

the country in which the book, register, or record is kept. These latter words contemplate foreign or colonial registers. The burden of proving that the duty is so enjoined will be on the person who wishes to give the entry in evidence. (See Section 104, *post.*)

In England it is essential to the admissibility of this evidence that the entries should have been made promptly, or at least without such long delay as to impair their credibility, and in the mode required by law, if any has been prescribed. The Indian Evidence Act contains no rule on these points, which may, however, be of importance in estimating the value of the evidence. In India as well as in England, the entry must have been made by a person whose duty it was to make it. The entry will be none the less admissible, even though the person who made it, being alive and capable of giving evidence, be not called as a witness.

As to the proof of the contents of public and official documents by certified copies or otherwise, see Sections 76, 77, and 78, *post.*

The following are examples of books, registers, and records in India, which come within the purview of the above section:—Log-books (see Sections 103—108, Act I of 1859, and Sections 280—285 of the Merchant Shipping Act, 17 & 18 Vict., Cap. 104)—Marriage Registers (see Sections 28, 32, and 54, and Schedules III and IV Act XV of 1872; 14 and 15 Vict., Cap. 40; Sections 14, 21, and 49 Act V of 1852; Act XXV of 1864; Section 44, Act V of 1465; Section 6 and Schedule, Act XV of 1865 (Parsees); Act III of 1872 and 14 & 15 Vict., Cap 40)—Registers[1] directed by Part XI of the Indian Registration Act, VIII of 1871—Registers of printing-presses, newspapers, and books published in India, Act XXV of 1867—of Copy-Right, Act XX of 1847—of New inventions, designs, patterns, &c., Section 11, Act XV of 1859, Act XIII of 1872—of Literary, Scientific and Charitable Societies, Act XXI of 1860—of Joint-stock Companies, &c, under the Indian Companies Act, X of 1866—of British Ships, Section 4, Act X of 1841; 17 & 18 Vict., Cap. 104—Registers prescribed by the various Municipal Acts—Proceedings of registered companies and municipal committees, recorded in accordance with the provisions of the particular Act applicable thereto—of Vessels on the river Indus, Act I (Bom C.) of 1863—Quinquennial registers in the Bengal Presidency, *Srimati Udai Mani Debya and others* v. *Bishonath Dutt and others*, VII W. R., Civ. Rul., 14, and see *Kashi Chandra Rai and others* v. *Nur Chandra Debya Chaudhrain and another*, 18th April, 1849, S. D. A. Decis., Beng., 113—Records of Rights, Section 14 of the Panjáb Land-Revenue Act, XXXIII of 1871, and the Settlement record prescribed by clause 9, Section 9, Bengal Regulation VII of 1822.[2]]

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[1] See also the repealed Acts—XX of 1866, XVI of 1864, XI of 1851, XVIII of 1847, IV of 1845, XIX of 1843, I of 1843, XXX of 1838.

[2] See Appendix II.

Maps and plans when relevant.

36. Statements of facts in issue or relevant facts, made in published maps or charts generally offered for public sale, or in maps or plans made under the authority of Government, as to matters usually represented or stated in such maps, charts, or plans, are themselves relevant facts.

[There are two kinds of maps and charts here spoken of, *viz.*, (1) published maps or charts generally offered for public sale, and (2) maps or plans made under the authority of Government. The admissibility of the first kind depends pretty much on the same grounds on which a Judge may refer to a dictionary for the meaning of a word or to an historical work for information on matters of public history, &c. (See penultimate paragraph of Section 57, *post.*) The publication being accessible to the whole community and open to the criticism of all, the probabilities are in favour of any inaccuracy being challenged and exposed. In the case of *Rájá Sahib Prahlad Sen* v. *Maharájá Rajendra Kishor Singh*, II B. L. R., P. C., 139, their Lordships of the Privy Council referred to "any good general map of India." It may be observed that this section goes somewhat further than English law under which the maps of the Ordnance Survey in Ireland, though notoriously drawn up with great care and accuracy, have been held inadmissible. (*Swift* v. *McTiernan*, 11 Ir. Equity Reports, 632.)

As to the second kind, the most important maps made under the authority of the Government in India are those of the great Trigonometrical Survey. In Bengal the Revenue Survey is conducted by two sets of officers, having distinct duties clearly defined. The Revenue Surveyor, directing the professional portion of the work, only surveys the *external* boundaries of villages. He has nothing to do with the *internal* measurements further than to calculate the areas of the *mahalwárí* plots which the Superintendent of Survey may send to him for triangulation. The professional maps are, therefore, a record of the geographical and topographical features of villages, and do not incorporate any of the details which are depicted on the *tâk-bast* and *khasrá* maps only.[1] These latter are prepared by the Civil Department, consisting of a *Superintendent of Survey* aided by Deputy Collectors and an establishment of Amíns and Peshkárs. The work, preparatory to the professional survey, consists in demarcating the boundaries of villages and estates and settling boundary disputes.[2]

[1] Rules of the Revenue Department in Lower Bengal, Chap. XXIII, Section ii, para. 21, p. 320.

[2] *Idem*, Chap. XXIII, Section i, para. 5, p. 315.

Such disputes are settled by Deputy Collectors invested with powers under Regulation VII of 1822 for this purpose. The *tâk-bast* (tâk—a mark, land-mark, boundary-mark) map embraces, besides the exterior boundaries of villages, the demarcation of the boundaries of every estate in the village. The village-boundaries are laid down in the first instance, and then the position and boundaries of all estates having land in that village. The lands entitled to separate demarcation and distinct entry in the *tâk-bast* maps are: (1) Permanently settled revenue-paying estates; (2) Resumed tenures brought on the Revenue-Roll; (3) Confirmed revenue-free (*lakheraj*) tenures; (4) Detached blocks of any of the foregoing.[1] *Khasrá* or detailed measurement is resorted to in the case of great interlacing of estates. On this map each field is separately defined.[2] For a description of *chitas* prepared during this measurement, see *Appendix I, post.* The co-operation of the parties interested in the measurement is directed to be sought. They are to be induced, if practicable, to make themselves acquainted with the contents of the *tâk-bast* and *khasrá* plans, and to sign them or state their objections in writing.[3]

It will be important to notice some of the decisions of the Courts as to the admissibility and effect of the maps and papers connected with the survey. In the case of *Gopinath Singh* v. *Anandmoyi Debya and others*, VIII W. R., Civ. Rul., 1867, Bayley, J., said: "The real point which we have to decide is, whether certain copies of *chitás, i. e.* measurement papers, and copy of a field-book of the Survey Department (these copies being certified by the Collector as taken from the records of his office) are to be received as evidence or not..... I am of opinion that these copies are evidence. In the *first* place, I think that they are admissible in the same way that Her Majesty's Privy Council admitted attested copies of somewhat similar records on the grounds stated in page 137, Moore's Indian Appeals, Vol. VII.[4] In the *second* place, I think that, as these papers are the primary records out of which a survey map is made, they are originally component parts of the map, and that thus they are receivable under Sections 11 and 13, Act II of 1855, as evidence of the fact of demarcation of lands and properties, measured and surveyed at or about the date of such map, and for the purposes of the State and of litigated questions respectively. Further, it may be noticed that before these survey measurements and survey field-book and survey map are made,

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[1] Rules of the Revenue Department in Lower Bengal, Chap. XXIII, Section ii, paras. 11—12, pp. 318—319.

[2] *Idem.* Chap. XXIII, Section iii, para. 14, p. 319, and Section iii, para. 1, p. 320.

[3] *Idem.* Chap. XXIII, Section iii, para. 11, p. 322.

[4] The passage here referred to is in the judgment in the case of *Unidi Rajaha Raje Venkataperumal Rauze Bahadúr* v. *Pemmasami Venkatadry Naidú and others*, and will be found at pages 66, 67, *ante.*

notices are issued under Regulations VII of 1822 and IX of 1825 to parties who wish to be present and watch that their interests are not prejudiced, so that these records cannot be said to be made in the absence of the parties, for legally they were present when they had the opportunity of being present. *Lastly*, I think under Section 56, Act II of 1855, the records referred to are admissible, because public officers are not at liberty to give originals to parties; and certificated copies of such official records have always ordinarily been received in this Court as evidence, and acted upon in deciding cases. The whole current of decisions will show this up to that of the Full Bench, VIII W. R. 338.[1] I would, therefore, receive these survey measurement papers and field-book." Markby, J., concurred.

In the case of *Eckowri Singh and others* v. *Hiralal Singh and others* (XI W. R. P. C. 2, II B. L. R. P. C. 4) their Lordships of the Privy Council remarked as follows:—" To admit documents not strictly evidence at all, to prop up oral evidence too weak to be relied upon, is not a course which their Lordships would be inclined to approve; and none of the *chitás* which have been laid aside by the High Court are shown to have been admissible in evidence according to the laws of evidence regulating the decisions of those Courts. It would expose purchasers to much danger if their possession could be disturbed by inferences from, or statements in, documents not legally admissible in proof against them. The document on page 19 appears to be only a copy, and it is introduced by no evidence preparing the way for its reception. Whatever might be the value of the *chitás* in general in questions between the *zemindar* and his tenants or *ryots*, to receive them as evidence of boundary against a rival proprietor, without further account, introduction, or verification, would if it obtained as a practice—and each relaxation is apt to become a precedent for another—tend further to encourage the manufacture of evidence in a place already too prone to the fabrication of it." There is nothing to show what was the nature of the *chitás* here offered in evidence, save that in the words of the judgment they were offered *without further account, introduction, or verification*. In the case of *Sadakhina Chaudhrain* v. *Raj Mohan Bose*, III B. L. R. A. C, 381, Bayley, J., referring to the above observations of their Lordships of the Privy Council, said " *There*, the Lords of Her Majesty's Privy Council speak of *chitás* as no evidence of title in boundary

[1] The case here referred to is that of *Kanhya Lal and others* v. *Radha Churn and others*, bearing on the subject of judgments *inter partes* and *in rem* (see note to Section 41, *post*). An erroneous idea arose that the principles enunciated in this judgment were applicable to *ták-bast* maps or other similar surveys. In *Moti Lal and others* v. *The Rani, wife of Maharaja Bhup Singh Bahadur and others*, VIII W. R. 66, Peacock, C. J. however declared that there was no intention on the part of the Judges who delivered judgment in the case of *Kanhya Lal*, &c., to lay down any rule as to the admissibility or otherwise of *ták-bast* maps.

disputes between rival proprietors, when they are without further account, introduction, or verification. But *here* are *chitás* and other documents which are shown by their character and attestation not to be at least fabricated documents, as pleaded by the special appellants, and to be supported by evidence. Besides, there is the Amín's report, and on the deputation of the Amín both the parties filed *chitás* and other papers of the same character before him in support of their respective allegations." Hobhouse, J. taking the same view, said: "By these words it seems to me their Lordships held that if *chitás* are relied upon without any account given or verification made of them, then they are not to be considered as evidence, but here an account was given of the *chitás*, and they were properly introduced and verified, and therefore that remark of their Lordships does not seem to me to apply to the *chitás* now before us. They were, therefore, I think properly used as evidence in this case." It may here be observed that the reports do not always show what was the precise nature of the *chitás* offered in evidence in each particular case; and to this may be attributable some of the difference of opinion which seems to prevail on the subject in question. There is and ought to be a wide distinction, as regards both weight and admissibility between the *chitás* and other measurement papers of the Revenue Survey of the country, designed and carried out as an executive act of State, the similar papers of a decennial survey made under the provisions of Act IX of 1847 (see p. 166), the *chitás* of a measuremant of a particular *khas mehal* made by Government as zemindar, the *chitás* of a measurement made by a private zemindar at a time when all was peace between him and his ryots, and the *chitás* of a measurement made by the same zemindar when disputes had arisen as to enchancement of rents, and a measurement could be made at all only by resort to the stringent provisions of Sections 9, 10, and 11 of Act VI (B. C.) of 1862 or the corresponding Sections 37, 38, 39, 40, and 41 of Act VIII (B. C.) of 1869. If the original records of the reported cases were examined with reference to this distinction, it is more than probable that any seeming difference of opinion may be found reconcilable with sound and uniform principle. Where certain *chitás* were produced by the plaintiff as evidence of certain lands being *mál* or rent-paying, it was held that they were sufficiently attested by the deposition of the village gomashtah that they were the *chitás* of the village while he was gomashtah, and that he had been present when, with their assistance a *purtal* (new, revised,) measurement had been carried out in the village (*Debí Persad Chattopadya* v. *Ram Kumar Ghosal and others*, X W. R., 443). The *chitás* of the Government Survey have been always held admissible as evidence in cases in the Chittagong District (*Mahomed Fedei Sirdar* v. *Ozi-udin and others*, X W. R. 340.) In this district the estates are very small, smaller than in most other districts in Lower Bengal, so that *khasrá* or detailed measurement

was largely resorted to by the Survey authorities. As to the value of these *chitás* the following observations were made in another case from the same district: "I think also that there is nothing in the objection that the Judge was wrong in law in looking at the survey *chitás*. The Judge was in no way wrong in relying upon them to a certain extent as he did, as corroborating the other substantial evidence in the case. Of course the *chitás* would not have been evidence in themselves if unsupported by other substantial evidence; but as there was other evidence, and the *chittás* were treated merely as corroborative, I think the appeal fails and must be dismissed,"—per Macpherson, J., *Srimati Arman Bibi and others* v. *Srímati Amírunissa and another*, Special Appeal No. 1294 of 1871, decided on 28th February, 1872, by Calcutta High Court—See also *Lalit Narain Singh and others* v. *Narain Singh and others*, I W. R. Civ. Rul. 333, in which it was observed that survey proceedings are not conclusive as to title. To the same effect, *Kailas Chunder Ghose* v. *Raj Chandra Bandupadya*, XII W. R. 180, in which it was held that an award by the Superintendent of Survey is not conclusive evidence of a contested right in a regular suit. In *Mahomed Meher Chaudhri and others* v. *Sib Persad Surmah and others*, VI W. R. Civ. Rul. 267, it was thus observed—"The law requires the Revenue authorities to survey and make *táh* according to possession; but it may happen that a party not in possession may succeed in obtaining a *táh* favorable to his interests and prejudicial to those of the party actually in possession, to set aside which the latter must be obliged to sue in a Civil Court. The Lower Appellate Court by holding the survey map to be of itself conclusive proof of possession by the defendant, has attached much more weight to it than it legally deserved in a case like this, brought to show that it was wrongly prepared." In *Mahima Chandra Chakravartti* v. *Raj Kumar Chakravartti*, I B. L. R. A. C. 5, Peacock, C.J., said of an award and map made under Regulations VII of 1822 and IX of 1825: "The award and the map do not *determine* the title of the parties, nor are they evidence of title." This must, however, be understood with reference to the facts of that particular case, in which the award and the map were the very subjects of litigation.

That survey maps are evidence of possession, and therefore also of title is a proposition supported as well by what has been said above as also by the following cases: *Shaushi Mukhi Dasya and others* v. *Bisses-suri Debya*, X W. R. 343, and *Kamodini Debya* v. *Purno Chandra Mukhapadya*, X W. R. 301. In the latter case it was said that, under Section 13, Act II of 1855, Government survey maps are evidence, not only with regard to the physical features of the country depicted, but also with regard to the other circumstances which the officers deputed to make the maps are specially commissioned to note down. Further than this it was observed they are not evidence as to

rights of ownership. In connection with *ták-bast* maps, see also *Rájá Sahib Prahlad Sen* v. *Maharájá Rajendro Kishor Singh*, II B. L. R. P. C. 138, and *John Kerr* v. *Nazar Mahomed and another*, Suth. Priv. Coun. App. 546.

The Revenue Survey of Bengal was not made under any Act of the Legislature. Act IX of 1847, however, recites the fact of such a survey being made under the authority of Government; and Section 3 of the same Act enacts that it shall be lawful for the Government of Bengal, in all districts or parts of districts of which a Revenue survey may have been or may hereafter be completed and approved by Government, to direct from time to time, *whenever ten years from the approval of any such survey shall have expired*, a new survey of lands on the banks of rivers, and on the shores of the sea, in order to ascertain the changes that may have taken place since the date of the last survey, and to cause new maps to be made according to such new survey. Alluvion and diluvion are constantly going on throughout the whole delta of Lower Bengal traversed by the various branches of the great rivers Ganges and Brahmaputra. The other Sections of the Act declare the dates on which the Revenue survey of certain districts shall be deemed to have been approved, and as to other districts that the approval shall be deemed to have taken place on such date as may be notified in the *Calcutta Government Gazette*; and provide for abatement of the Government revenue where diluvion has taken place, and increase thereof where alluvion has added to the area of the estate. See also Acts XXXI of 1858 and IV (B. C.) of 1868.

Section 13 of the repealed Act II of 1855 was as follows: "All maps made under the authority of Government or of any public municipal body, and not made for the purpose of any litigated question, shall *primâ facie* be deemed to be correct, and shall be admitted in evidence without further proof." To the same effect, but slightly different, Section 83 of the present Act—"The Court *shall presume* that maps or plans purporting to be made by the authority of Government were so made, and *are accurate*; but maps or plans made for the purposes of any cause must be proved to be accurate." This section is silent as to maps made under the authority of any public municipal body. As to the effect of the words "shall presume," see Section 4, *ante*, page 76. Under the provisions of Section 87, *post*, the Court *may presume* that any published map or chart, the statements of which are relevant facts, and which is produced for its inspection, was written and published by the person, and at the time and place, by whom or at which it purports to have been written or published. It may also be observed that the presumption provided for by Section 90, *post*, will apply to a map or chart as well as to any other document, purporting or proved to be thirty years old.]

Statement as to fact of public nature contained in any Act or Notification of Government, when relevant.

37. When the Court has to form an opinion as to the existence of any fact of a public nature, any statement of it, made in a recital contained in any Act of Parliament or in any Act of the Governor-General of India in Council, or of the Governors in Council of Madras or Bombay, or of the Lieutenant-Governor in Council of Bengal, or in a notification of the Government appearing in the *Gazette of India*, or in the Gazette of any Local Government, or in any printed paper purporting to be the *London Gazette* or the Government Gazette of any colony or possession of the Queen, is a relevant fact.

[In the case of the *Queen* v. *Amírudin*, VII B. L. R. 63, the *Gazette of India* and the *Calcutta Gazette*, containing official letters on the subject of hostilities between the British Government and certain Mahomedan fanatics on the frontier were held to have been rightly admitted in evidence under Sections 6 and 8 of the repealed Act, II of 1855, to prove the commencement, continuation, and determination of hostilities: and, under Section 6 of the same Act, a printed letter from the Secretary to the Government of the Panjáb to the Secretary to the Government of India was ruled to have been properly used as a document of reference (see penultimate para. of Section 57, *post*) for the same purpose, though the letter, it was observed, was not evidence of the facts mentioned in detail by the writer thereof. In the subsequent trial of the Wahábí conspirators at Patna, the *Gazette* was used in evidence for a similar purpose. It may be observed that the Section does not specifically mention recitals contained in the Bengal, Madras, and Bombay Regulations, passed up to 1834, A.D.

The fact, as to the existence of which the Court has to form an opinion, must be *a fact of a public nature*. In connection with the present Section may be read Section 57 as to judicial notice of Acts, &c; Section 78 as to the mode of proving notifications and other official documents; and Section 87 as to presumptions concerning gazettes; as also "The Documentary Evidence Act, 1868," 31 Vict., Cap. 37 (see note to Section 78, *post*).

Previous to 1863, the Government of India had no exclusive organ of its own, its notifications, orders, &c., being published in any of the Gazettes of the Local Governments, as was necessary. In that year the "*Gazette of India*" was first published as the Gazette of the Government of India exclusively; and Act XXXI of 1863 was passed to give to publication

in the "*Gazette of India*" the same effect as publication in any other Gazette in which publication was prescribed by the law then in force.

Mr. Taylor, speaking of the admissibility and effect of public documents, observes that, "if their contents be pertinent to the issue, they will generally be admissible, either as *primâ facie* or as conclusive proof of the facts directly stated in them; and in many cases they will be received in evidence even of such matters as are inserted in them by way of introductory recital. Thus, where certain *public Statutes* recited that great outrages had been committed in a particular part of the country, and a public *proclamation* was issued with similar recitals and offering a reward for the discovery and conviction of the perpetrators, these were held admissible and sufficient evidence of the existence of those outrages to support the averments to that effect in an information for a libel on the Government in relation thereto.[1] So a recital of a state of war in the preamble of a public Statute is good evidence of its existence, and the war will be taken notice of without proof, whether this nation be or be not a party to it.[2] So a recital of relationship, even in a *private* act, has been received by the House of Lords as cogent evidence of a pedigree in a peerage case; because such recitals *used* never to be inserted in a private act, unless their truth had first been ascertained by the Judges, to whom the Bill had been referred. As, however, the evidence in support of private bills is no longer submitted to the Judges for approval, recitals inserted in them since this change in the practice would seem to be inadmissible; for, as a general rule, a local or private Statute, though it contains a clause requiring it to be judicially noticed is not as against *strangers* any evidence of the facts recited; neither does it affect the public with a knowledge of its contents. The recitals, too, in a *public act are not conclusive evidence:* and, therefore, where the Schedule of the Municipal Corporation Act described a place as an existing borough, proof was admitted to show that this description was false." (Vol. II, § 1473.)

English Law.

Gazettes as well as other newspapers are frequently offered in evidence, with the view of fixing the adversary with the *knowledge* of certain facts advertised therein; but it is always advisable and sometimes necessary, *unless the case is governed by a special Act*, to furnish some evidence, from which it may be inferred that the party affected by the notice has read it. This may be done by proving that the person has been in the habit of taking in the gazette or other newspaper, or has attended a reading-room where it was taken in, or has shown himself acquainted with other articles in the number containing the notice. The *Gazette* containing *a notice of dissolution of*

1 *Reg.* v. *Sutton*, 4 Maule and Selwyn's Reports, 532.
2 *Reg.* v. *De Berenger*, 3, *id.* 67, 69.

partnership is admissible without any additional proof against all persons who have had no previous dealings with the firm, though to those who have had such dealings the knowledge of such notice must be brought home, or proof be afforded of a special notice having been given by circular or otherwise: and see Section 264 of the Indian Contract Act, IX of 1872.]

Statements in Law-books.

38. When the Court has to form an opinion as to a law of any country, any statement of such law contained in a book purporting to be printed or published under the authority of the Government of such country and to contain any such law, and any report of a ruling of the Courts of such country contained in a book purporting to be a report of such rulings, is relevant.

["any country" will include India, England, and foreign countries. Books of Reports have at all times been admitted in the Courts of a country as evidence of the law of that country: and here the section only acknowledges and legalizes the practice of the Courts. But so far as *foreign* law is concerned, it is an innovation on the English Law of Evidence, which requires the laws, as well written as unwritten, and the usages and customs of *Foreign States* to be proved by calling professional or official persons to give their opinions on the subject; and will not allow books of such law to be directly referred to, although, as in matters of science, the witness may refresh his memory by referring to text-books, decisions, statutes, codes, &c. It will be observed, however, that the books, in order to be admissible under the above section, must purport to be printed or published under the authority of the Government of such country; and must also purport to contain such law. Reports of rulings need not, however, be published under authority, if only the book containing them purport to be a report of the rulings of the Courts of such country.

For other methods of proving foreign law, see Section 45, *post*, and the note thereto: and in connection with the present section read Section 84, *post*, which enacts that the Court *shall presume* (see Section 4) the genuineness of the books here mentioned.]

How much of a Statement is to be proved.

What evidence to be given when statement forms part of a conversation, document, book, or series of letters or papers.

39. When any statement of which evidence is given forms part of a longer statement, or of a conversation or part of an isolated document, or is contained in a document

which forms part of a book, or of a connected series of letters or papers, evidence shall be given of so much and no more of the statement, conversation, document, book, or series of letters or papers as the Court considers necessary in that particular case to the full understanding of the nature and effect of the statement, and of the circumstances under which it was made.

["Though the whole of a document," says Mr. Taylor, "may at Common Law be read by the one party where the other has already put in evidence a partial extract, this rule will not warrant the reading of *distinct entries* in an account-book, or distinct paragraphs in a newspaper, unconnected with the particular entry or paragraph relied on by the opponent; nor will it render admissible bundles of proceedings in bankruptcy, entries in corporation-books, or a series of copies of letters inserted in a letter-book, merely because the adversary has read therefrom one or more papers or entries or letters. If, indeed, the extracts put in expressly refer to other documents, these may be read also; but the mere fact that the remaining portions of the papers or books *may* throw light on the parts selected by the opposite party, will not be sufficient to warrant their admission, for such party is not bound to know whether they will or not; and, moreover, the light may be a false one." The same rule prevails in the case of a *conversation*, in which several distinct matters have been discussed. It was at one time held that if a witness were questioned as to a statement made by an adverse party, such party might lay before the Court the whole which was said by him in the same conversation, even matter not properly connected with the statement deposed to, provided only that it related to the subject-matter of the suit: yet a sense of the extreme injustice that might result from allowing such a course of proceeding, has induced the Courts, in later times, to adopt a stricter rule; and if a part of a conversation is now relied on as an admission, the adverse party can give in evidence only so much of the same conversation as may explain or qualify the matter already before the Court. This was decided in the case of *Prince* v. *Samo*,[1] which was an action for malicious arrest for debt, the plaintiff contending that the money had been a gift, not a loan. A witness for the plaintiff acknowledged, on cross-examination, that he had heard the plaintiff admit on oath that he had repeatedly been insolvent, and had been remanded by the Court. He was then asked in re-examination whether the plaintiff had not on the same occasion expressly stated that the money was *given* and not *lent*. The Court in holding that the answer to this question was not evidence, observed

[1] 7 Adolphus and Ellis' Reports, 627.

that if it were, "the jury would be bound to consider it, and might give full effect to it, and thus award large damages for an injury of which no particle of proof could be found but the plaintiff's own assertion;" and they added that "the reason of the thing would rather go to exclude the statements of a party making declarations which cannot be disinterested."

A party may put in letters written by his opponent without producing or calling for the production of those to which they are answers, these latter being in the adversary's hands who can produce them, if he thinks them necessary to explain the transaction. If there be something written on the back by the person producing them, the other side is entitled to have the whole of it read. Where a defendant produced several letters between himself and the plaintiff, he was allowed to read his own reply to the last one, this being considered as part of an entire correspondence.[1]]

JUDGMENTS OF COURTS OF JUSTICE WHEN RELEVANT.

Previous judgments relevant to bar a second suit or trial.

40. The existence of any judgment, order, or decree which by law prevents any Court from taking cognizance of a suit or holding a trial, is a relevant fact when the question is whether such Court ought to take cognizance of such suit, or to hold such trial.

[Section 2 of the Code of Civil Procedure enacts that "the Civil Courts shall not take cognizance of any suit brought on a cause of action which shall have been heard and determined by a Court of competent jurisdiction, in a former suit, between the same parties, or between parties under whom they claim." The precise effect of these provisions in individual cases has been held by some to concern the province of "Procedure," not that of "Evidence;"[2] but in most treatises on evidence, including among the number Mr. Taylor's valuable work, the subject is to be found discussed, often at considerable length. For this reason, and because this book is intended for practical purposes, I think some elucidation of the above rule will not be out of place.

Application of the Rule to Civil Cases.

The reason of the rule is founded on the legal maxim—*Interest reipublicæ ut sit finis litium*—"It is for the benefit of the community that there be some limit to litigation."

Reason of the Rule.

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[1] See Taylor, §§ 661, 662, and 663.

[2] See *ante*, page 5.

If matters which have been once solemnly decided were to be again drawn into controversy, if facts once solemnly affirmed were to be again denied whenever the affirmant saw his opportunity, the end would never be of litigation and confusion.[1] "If," said Lord Kenyon, C. J., "an action be brought, and the merits of the question be discussed between the parties, and a final judgment obtained by either, the parties are concluded, and cannot canvass the same question again in another action, although, perhaps, some objection or argument might have been urged upon the first trial which would have led to a different judgment;" and again, "After a recovery by process of law, there must be an end of litigation; if it were otherwise, there would be no security for any person."

Rule how stated in Duchess of Kingston's case.

In the Duchess of Kingston's case, Sir William DeGrey, C. J., delivering the unanimous opinion of the Judges present, stated the rule in the following terms:[2] "From the variety of cases relative to judgments being given in evidence in Civil suits, these two deductions seem to follow as generally true: *first*, that the judgment of a Court of *concurrent* jurisdiction, *directly upon the point*, is as a plea, a bar, or as evidence, conclusive *between the same parties*, *upon the same matter*, directly in question in another Court; *secondly*, that the judgment of a Court of *exclusive* jurisdiction, directly upon the point, is, in like manner, *conclusive upon the same matter*, *between the same parties*, *coming incidentally in question* in another Court for a *different* purpose: but neither the judgment of a concurrent or exclusive jurisdiction is evidence of any matter which came *collaterally* in question, though within their jurisdiction, nor of any matter *incidentally cognizable*, nor of any matter to be *inferred by argument* from the judgment." In the case of *Khagauli Singh* v. *Hosein Baksh Khan* before the Privy Council on the 19th and 20th January, 1871, their Lordships, having quoted the rule as stated by Sir William DeGrey, C. J., said, "There is nothing technical nor peculiar to the law of England in the rule as so stated. It was recognized by the Civil Law,[3] and it is perfectly consistent with the second section" (above quoted) "of the Code of Procedure under which this case was tried (VII B. L. R. 673). There is thus the very highest authority for applying to the decision of cases in India the rule as laid down in the Duchess of Kingston's case. In discussing the effect of this rule, it will be useful to consider the following points—1*st*, The judgment must be that of a Court of competent[4] jurisdiction,

This Rule equally applicable to India.

[1] II Smith's Leading Cases, 656, Note to Duchess of Kingston's case.

[2] II Smith's Leading Cases, 643.

[3] See Broom's Legal Maxims, pp. 321, 323, and the *exceptio res judicatæ* of Roman law there explained. See also Tomkins' and Jenckin's Modern Roman Law, p. 94.

[4] This word is expressly used in the second section of the Code of Civil Procedure.

whether concurrent or exclusive; *2nd*, The judgment must have been given directly on the point; *3rd*, It is conclusive only between the same parties and those who claim under them respectively; *4th*, It is conclusive only upon the same matter. The student will find the authorities under English law collected in Mr. Smith's Second Volume of Leading Cases. The illustrations of the rule which follow are taken principally from Indian decided cases.

Court must be of competent jurisdiction, concurrent or exclusive.

I. Whether a particular Court has jurisdiction over a particular subject-matter is a question which arises constantly in India, and occasionally the answer to this question is not free from difficulty. Different Courts, Civil Courts and Revenue Courts, were established for different purposes from the earliest period of our rule: and their separate jurisdictions were not always very accurately defined by the laws under which they were constituted. Some of these Courts were created for a temporary purpose only, and ceased to exist as soon as they had performed the special work for which they were designed. Others of them have been in the course of time and reform abolished or materially altered, their jurisdiction being either transferred to *other* Courts or so essentially changed as almost to involve the creation of a new tribunal. To give the merest intelligible sketch of all the Courts that have existed in India since the establishment of British rule, and of their various jurisdictions, would occupy more space than is consistent with my present limits. It must, therefore, suffice to say here that the Courts, both Revenue and Civil, in each Presidency are constituted and regulated by different Acts of the Legislature: for example—the Civil Courts in Bengal, by Act VI of 1871—the Civil Courts in the Madras Presidency by a number of Acts and Regulations which are now being consolidated into a single Act—the Civil Courts in the Bombay Presidency by Act XIV of 1869—the Civil Courts in Oudh by Act XXXII of 1871—the Civil Courts in the Panjáb by Acts XIX of 1865, IV of 1866, XXVII of 1867, and VII of 1868—the Civil Courts in the Central Provinces by Acts XIV of 1865 and XXVII of 1867—the Civil Courts in the Jhansí District by Act XVIII of 1867—the Civil Courts in British Burmah by Act VII of 1872—the Civil Courts in the Province of Sind by Acts XII (Bom. C.) of 1866, V (Bom. C.) of 1867, III (Bom. C.) of 1868, and V of 1872—the Courts in Coorg by Act XXV of 1868—the Courts at Aden by Act II of 1864—the Courts of Small Causes in the Presidency Towns by Acts IX of 1850, XX of 1857, and XXVI of 1864—Courts of Small Causes outside the Presidency Towns by Acts XI of 1865 (which gives jurisdiction up to Rs. 500, which may be extended by the Local Government to Rs. 1,000, in cases of claims for money due on bond or other contract, rent, personal property, and dámages), X of 1867, &c.—Revenue Courts in the Bengal Presidency by Acts X

of 1859, XIV of 1863 (N-W-P. only), VI (B. C.) of 1862, VIII (B. C.) of 1869, and III (B. C.) of 1870—Revenue Courts in the Province of Oudh by Act XIX of 1868—Revenue Courts in the Madras Presidency by Act VIII (M. C.) of 1865, &c., &c.,[1] One main feature to be found in all or most of these Acts is the constitution of Courts of various grades with different pecuniary limits of jurisdiction. The Revenue Courts have jurisdiction in matters connected with the Government revenue (and here, as a general rule, the jurisdiction of the regular Civil Courts is expressly excluded), and with the rent of land used for agricultural purposes. It may, however, be observed that the tendency of modern reform is to extend the jurisdiction of the regular Civil Courts to matters which were formerly reserved to the Revenue Courts only. For example, in Lower Bengal, Act VIII (B. C) of 1869 has, in those districts in which it has been put into operation, transferred to the Civil Courts the jurisdiction previously exercised by the Revenue Courts in all questions arising between the landlords and tenants of land used for agricultural or similar purposes.

Partition of Estates.

Under the provisions of Bengal Regulation XIX of 1814, the partition of estates paying Revenue to Government is to be made by the Collector or other Revenue authority. If, however, there is a dispute as to title or as to the shares of the parties admittedly interested, this dispute must be settled before the Revenue authorities can proceed to make the partition, and the Civil Courts have jurisdiction to adjudicate upon such disputed question of title or of shares. Parties wishing to object on this ground must do so within *fifteen* days from the date of the publication of the advertisement provided for in Clause 2 Section 4. The paper of partition is submitted by the Collector to the Commissioner or Board of Revenue, whose determination thereupon is final (Section 20) and cannot be questioned by a suit in the Civil Court (*Zaker Ali Chaudhrí* v. *Jagdesurí*, I W. R. Civ. Rul. 323; *Ramsahai Singh and others* v. *Syud Muzhar Ali and others*, II B. L. R., App. 41; *Radha Balabh Singh* v. *Maharajah Dheraj Mahatab Chand Bahádúr*, II W. R., Mis. Rul. 51). This finality, however, extends only to those matters which are within the special jurisdiction of the Revenue authorities, *viz.*, the apportionment of the revenue, &c., and not to questions of right and title over which they have no jurisdiction. Although, therefore, a suit cannot be maintained in the Civil Court for the purpose of enforcing a re-distribution of the lands and of the Government revenue, a suit will lie for a declaration of right to a larger share than that recorded in the paper of partition; and as to this excess the plaintiff may be declared

[1] The above list includes the most important of the Acts now in force. Others also in force, as well as those that have been repealed, will be found in the Author's "Chronological Table of, and Index to, the Indian Statute Book."

a shareholder in the *patti* or divided estate in which it may have been included (*Spencer* v. *Pahal Chaudrí and others*, VI B. L. R., 659, 663 note; *Harí Persad Jah* v. *Madan Mohan Tákur and another*, VIII B. L. R. App. 72). When a Civil Court having adjudicated upon a question of title has issued a precept to the Collector to have a partition made, such Court can direct by whom the costs of making the partition are to be paid, and the Revenue authorities are bound by the orders of the Civil Court on this point (*Baijnath Saha* v. *Lalla Sithal Persad*, II B. L. R., F. B. 1, and X W. R., F. B. 66; *Har Gopal Das* v. *Ram Golam Sahú*, V B. L. R., 135). The Bengal Regulation XIX of 1814 applies only to the partition of estates paying revenue to Government. The Civil Courts have exclusive jurisdiction over the partition of *lakheraj* or revenue-free estates (*Fatteh Bahadúr* v. *Janakí Bibí and another*, IV B. L. R., App. 55).

When the Revenue authorities in Bengal, *acting within the jurisdiction* conferred on them by law, sell a revenue-paying estate for arrears of Government revenue or other demand recoverable in a similar manner, the Civil Courts have no jurisdiction to interfere, and any application for the reversal of a sale on the ground that it has not been conducted in accordance with the provisions of the law must be made by way of appeal to the Revenue Commissioner (Sec. 25, Act XI of 1859); and no such sale shall be annulled by a Civil Court except on the ground of its having been made contrary to the provisions of the Act, and then only on proof that the plaintiff has received substantial injury by the irregularity complained of, which must further have been specified in an appeal to the Commissioner (Sec. 33, Act XI of 1859). These provisions have, however, no application, and the Civil Courts have power to reverse a sale which has been made wholly *without jurisdiction* on the part of the Revenue authorities, as, for example, when there was no legally sufficient arrear of revenue (*Baijnath Sahú* v. *Lalla Sithal Persad*, II B. L. R., F. B. 1, and X W. R., F. B. 66 overruling *Umesh Chandra Chatterji* v. *The Collector of the* 24-*Pergunnahs*, VIII W. R., Civ. Rul. 439; *Jai Dúrga Debya* v. *Gopal Chandra Banneryi*, IX W. R., Civ. Rul. 538; *Mohan Ram Jha* v. *Sib Dutt Singh and others*, VIII B. L. R., 230 (Act VII (B. C.) of 1868); *Jokí Lal* v. *Nursingh Narain Singh and others*, IV W. R., Act X, Rul. 5, and *Khúnú and others* v. *Aodal Singh and others*, VIII W. R., Civ. Rul. 511 (Sale of land not within Collector's jurisdiction); and see *Nawáb Sidhí Nazir Alí Khan* v. *Ujúdhyaram Khan*, X Moo. Ind. Ap. 540). The last case raised the question of fraud. The Civil Courts have jurisdiction to reverse a sale of a *patni* tenure made by the Revenue authorities, when the requirements of the law, Regulation VIII of 1819, have not been complied with (*Krishno Mohan Saha and others* v. *Munshí Aftabudín Mahomed and others*, VIII B. L. R. 134;

Sales for arrears of land revenue, &c.

Beikanth Nath Singh and others v. *Maharajah Dheraj Mahatab Chand Bahadúr and others*, IX B. L. R. 87; *Sarúp Chandra Bhúmick* v. *Rájá Pertab Chandra Singh*, VII W. R. Civ. Rul. 219, and III R. C. and C. R. Civ. Rul. 148). As to the jurisdiction of the Civil Courts to reverse sales made by the Revenue authorities under Section 105, Act X of 1859, and under Act VIII (B. C.) of 1866, see *Mea Jan Munshí* v. *Kurrimamayí Debya*, VIII B. L. R., A. C. 1 (Here the real tenant was not made a party to the suit for arrears of rent, in execution of the decree obtained in which the tenure was sold); *Jan Ali* v. *Jan Ali Chaudhrí*, I B. L. R., A. C. 56 (Fraud, &c.); *Ruttan Maní Dasí* v. *Kalikissen Chakravarttí and others*, W. R., 1862—1864, Spec. No. 147; *Pran Bandhú Sirkar* v. *Sarbasandarí Debya*, III B. L. R. Civ. Ap. 52, Note; *Sadhan Chandro Bose* v. *Gúrú Charan Bose and others*, VIII B. L. R. 6, note; *Haranund Dutt* v. *Ram Dhun Sen* W. R., Jan.—July, 1864, Act X Rul. 122; *Mahomed Fazal* v. *Umakanth Sen*, I W. R. Civ. Rul. 159; *Jageshir Sahai* v. *Gopal Lal and another*, XI W. R. 260; *Jaikissen Mukherjí* v. *Harihar Mukherjí*, IX W. R. 286; *Sarúp Chandra Bhattacharjya* v. *Kashísharí Dasí and others*, VI W. R., Act X Rul. 55; *Ram Sundar Paramanick* v. *Prosonno Kumar Bose*, V W. R., Act X Rul. 22.

Separation of Shares of Revenue-paying Estates: sections 11 and 12, Act XI of 1859.

Under the provisions of section 11 of Act XI of 1859, when a *recorded* sharer of a joint estate, whose share consists of a specific portion of the land of the estate, desires to pay his share of the Government revenue separately, he may submit to the Collector a written application to this effect, and the Collector is authorized to deal therewith. If, however, any recorded proprietor of the estate, whether the same be held in common tenancy or otherwise, object that the applicant has no right to the share claimed by him, or that his interest in the estate is less or other than that claimed by him, or that the amount of revenue stated in the application to be payable on the share is not the true amount, the Collector shall refer the parties to the Civil Court, and shall suspend proceedings until the question at issue is judicially determined (section 12). If any such objection be made, and the Collector proceed notwithstanding to deal with the application for separation of shares, he acts without jurisdiction, and the Civil Court, on a suit being brought for this purpose, will set aside his proceedings (*Madan Mohun Mazimdar* v. *Baistab Charan Mandal and others; Púrna Chandra Gangúlí* v. *Madan Mohan Mazimdar*, VI B. L. R. 617, note). The Civil Court has jurisdiction to determine the *right* to a partition, though the partition itself must be carried out by the Collector (*Mahsan Ali* v. *Nasam Ali*, VI W. R. Civ. Rul. 15). In the case of *Har Gobind Das and others* v. *Baroda Persad Das*, VI B. L. R. 615, an objection had been made on the part of the plaintiff, when a minor, to an application for

separation of shares made by two persons. This objection alleged, amongst other things, that plaintiff was the proprietor of a four-anna *joint* share. If this allegation were true, the persons who had applied for separation of shares could not be sharers, *whose shares consisted of a specific portion of the land of the estate.* The objection, therefore, went to the very foundation of the Collector's jurisdiction. It was rejected on the ground that the plaintiff was not recorded as a sharer in the Collector's rent-roll. The plaintiff then brought a suit in the Civil Court for a declaration of his title and share and to set aside the proceedings of the Collector. It was held that he was entitled to the redress which he sought; and it was observed that otherwise the plaintiff would be without a remedy, the Collector being unable, as the law stands, to afford any remedy, as the plaintiff was not a *recorded* sharer.

Court of Wards.

The Civil Court has no jurisdiction to entertain a suit brought against the Court of Wards (see Bengal Regulation X of 1793, and Act IV (B. C.) of 1870) to restrain that Court from carrying into effect an order passed by the Board of Revenue directing that a minor be sent to Calcutta to be educated at the *Wards' Institution*, the interposition of the Civil Court being claimed on the ground that the minor's health would be seriously injured by his being brought to Calcutta, and that the Board of Revenue had no authority to reverse an order made by the Commissioner as to the place where the minor should be educated (*The Collector of Bîrbhúm* v. *Mandakinî Debya*, W. R., Jan.—July, 1864, Civ. Rul. 332). The Civil Courts have no power to question or interfere with arrangements made by the Court of Wards as to the remuneration of a manager of an estate under its charge (*Ranî Sharat Sundarî Debya* v. *The Collector of Maimansingh*, VII W. R. Civ. Rul. 221). The High Court refused to interfere to restrain the same Court in the matter of the bestowal in marriage of a female minor (*Gajádhar Persad Narain Singh, Petitioner*, V W. R. Mis. Ap. 41). A certificate of administration granted by the Civil Court, appointing a guardian under Act XL of 1858, cannot debar the Court of Wards from taking the infant and the estate under its management, when legally empowered so to do (*Madhú Súdhan Singh* v. *The Collector of Midnapore*, B. L. R., Sup. Vol. 199).

In a suit brought for the redemption of certain land from mortgage, the defendants pleaded that they had been in possession for upwards of twenty years under two deeds of absolute sale. The plaintiffs alleged that the real transaction was a mortgage by way of conditional sale for securing the sum of Rs. 4,000 with interest, and they relied upon an *ikrarnama* or deed to this effect, and of even date with the deeds of sale. The defendants had previously, in 1863, brought a suit for arrears of rent of 37 *bigas* against one of the plaintiffs, who had

successfully contended that these 37 *bigas* formed a portion of 75 *bigas*, part of the whole estate, which he and the other alleged mortgagors were, under a particular stipulation in the *ikrarnama*, entitled to hold rent-free. The Deputy Collector in the suit for arrears of rent had tried the question of the validity of the *ikrarnama*, and had decided that the real transaction was not an absolute sale but a mortgage. In the redemption suit, it was sought to use this judgment of the Deputy Collector as an estoppel between the parties, and the Agra High Court gave effect to it as such. An appeal was preferred to the Privy Council, and their Lordships, in reversing the decree of the High Court, observed as follows: "The judgment of the High Court is founded solely upon the omission of the Judge below to give due weight to the fact that the *ikrarnama* had been declared to be valid and genuine by the Deputy Collector, and it treats that finding as *res judicata* between the parties. But, if the judgment of the Deputy Collector had been final in the matter before him, his incidental finding that the *ikrarnama* was a valid instrument would not be conclusive between the parties in the present litigation: *for the question before him was not the issue now raised between the parties; and his decision was not that of a Court competent to adjudicate on a question of title. He had only a special jurisdiction to try summary suits for the recovery of rent. The* eadem causa petendi, *and judgment of a Court of competent or concurrent jurisdiction*, are both wanting here" (*Khagault Singh* v. *Hosein Baksh Khan*, VII B. L. R. 673). As to the decisions of the Revenue Courts not being conclusive on the question of title, see also *Dhonei Mandal* v. *Arif Mandal and others*, IX W. R. 306; *Ram Chandra Gupto* v. *Bhagabati Debya*, II W. R., Act X Rul. 85; *Pogose and another* v. *The Collector of Sylhet and others*, XII W. R. 150.

Limits of Jurisdiction of Revenue Courts.

A decision by a Revenue Court under clause 6, section 23, Act X of 1859, turns merely on the question of illegal dispossession[1] and is not a bar to a regular suit in the Civil Court to try the question of title (*Súrji Kant Rai* v. *Forlong*, I In. Jur. N. S. 382). An order of the Revenue Court refusing assistance under section 25, Act X of 1859, in ejecting a ryot or farmer is not a bar to a civil suit (*Gokul Chandra* v. *Ali Mahomed*, X W. R. 6); nor will an order under the same section granting such assistance be a bar (*Amanat Ali Chraudhri* v. *Mosen Ali*, II B. L. R. App. 36; see also *Hari Nath Das* v. *Tarachand Sirkar and another*, X W. R. 295, and *Madan Mohun*

[1] In fact, the question to be tried under this clause is exactly the same as may be tried under section 15, Act XIV of 1859. Such question must, however, arise between a ryot, farmer, or tenant, and the person entitled to receive rent for the land: otherwise the Revenue Court has no jurisdiction. *Query.*—Have the Civil Courts a concurrent jurisdiction in such cases, under section 15, Act XIV of 1859?

Rai v. *Gour Mani Gúpto*, B. L. R., Sup. Vol. F. B 31). In fact, an order passed under this section has in no respect the force of a judgment or decree (*Philip* v. *Sibnath Moitra*, B. L. R., Sup. Vol. F. B. 21; see also *Kishen Jiban Rai* v. *W. Ramey*, III W. R. Civ. Rul. 205). Proceedings under section 27, Act X of 1859, for the registry of *talúks* and other tenures are not proceedings in a suit so as to be a bar to a regular suit in the Civil Court (*Chandra Narain Ghose* v. *Kasinath Rai Chaúdhrí*, IV B. L. R., F. B. 43, overruling *Mahomed Nùr Buksh* v. *Mohan Chandra Poddar and others*, VI W. R. Act X, Rul. 67; also *Madhab Chandra Pal* v. *Hills*, I B. L. R. Civ. Rul. 175; X W. R. 197). But proceedings under section 28, Act X of 1859, to dispossess persons claiming to hold land free of revenue are a suit, from the decision of the Collector in which an appeal lies to the District Judge (*Bishambhar Misser and others* v. *Ganpat Misser*, B. L. R. Sup. Vol. F. B. 5). This section is concerned with alleged *lakheraj* lands, the tenure of which is said to be invalid by reason of the grant being made after the 1st December, 1790 (See s. 10, Ben. Reg. XIX of 1793: *Múrúbhí Sahú* v. *Latú Kúmár* alias *Dyebutti Kumar and others*, W. R. Special Number 70; *Maháraní Inderjít Kunwar* v. *Chokú Sahú*, W. R. Special Number 81, and B. L. R. Sup. Vol. F. B. 1, and *Skeikh Saheb Ali and others* v. *Lalla Biseshur Lal*, I W. R. Civ. Rul. 111). In respect of these alleged *lakheraj* grants, the Revenue Courts and the Civil Courts have a concurrent jurisdiction (*Sonaton Ghose and others* v. *Múlví Abdûl Ferar*, II W. R. Civ. Rul. 91; B. L. R. Sup. Vol. F. B. 109; approved by the Privy Council in *Harihar Múkhapadya* v. *Madab Chandra Babú*, and *Naba Krishno Mukhopadya* v. *Kailass Chandra Battacharjya*, VIII B. L. R. 576). A suit for the *enhancement* of the rent of land used for building purposes is cognizable by the Civil Courts only, and the Revenue Courts have no jurisdiction (*Raní Dúrga Sundarí Dasí* v. *Bíbí Amdatunnissa*, IX B. L. R. 101 (Full Bench); *Church* v. *Ram Tonú Saha and others*, XI W. R. 547). Where a suit for the enhancement of the rent of such lands had been brought in the Civil Court under the provisions of Act VIII (B. C.) of 1869, although upon a notice served under the provisions of Act X of 1859, it was held that the Civil Court had jurisdiction (*Brajanath Kundu Chaudhrí and others* v. *Lowther*, IX B. L. R. 121). Whether a suit to recover the *arrears* of rent of land occupied by buildings can be tried by the Revenue Courts is a question not wholly free from difficulty. In the case of *Mathuranath Kúndú* v. *Campbell*, IX B. L. R. 115, note, Norman, J. said, "If the principal subject of the demise, that for which substantially the rent is reserved, is land, I think it matters not that the value is increased by houses or other buildings standing upon the land. This Court so held in *Taríní Persud Ghose* v. *The Bengal Indigo Com-*

Lakheraj Lands.

Rent of Lands occupied with Buildings.

pany" (II W. R., Act X Rul. 9). " . . . . On the other hand, where the principal subject of occupation is a building or buildings, when the rent is substantially the price of the use and occupation of such building or buildings, the land on which the buildings stand being a merely subordinate matter, it may well be that the rent for such buildings cannot be truly described as 'the rent of land either *kherají* or *lakheráj*.' The cases of *Maharájá Dheráj Mahtab Chand Báhádúr* v. *Makund Ballabh Bose*,[1] *Bipro Das Dey* v. *Woollen*,[2] and *Harí Mahun Sirkar* v. *Moncrieff*,[3] fall apparently within this class of cases." In the first of the three cases here referred to, the demise was that of a *bazár*, and the rent issued out of the buildings as well as the land. Similarly, in the last case of the three the demise included *urháts, gháts, háts and bazárs*. See also *Watson & Co.* v. *Gabind Chandra Muzimdar*, W. R., Jan.—July, 1864, Act X Rul. 46; *Kali Kishen Bishwas* v. *Srimati Janki*, VIII W. R. Civ. Rul. 250; *Rani Surnomayi* v. *Blumhardt*, IX W. R. Civ. Rul. 552; *Ram Churn Singh Ketrí* v. *Meadham Darzí*, VIII W. R. Civ. Rul. 90; *Kalí Mohan Chatterjí* v. *Kali Krishna Rai Chaudhrí*, II B. L. R. App. 39; and *Shalgram* v. *Mussamat Kabíran*, III B. L. R. 61. The result of these cases may, perhaps, be said to be this, that, where the demise originally included the buildings as well as the land, the Revenue Courts have no jurisdiction to try a suit for arrears of the rent so reserved. Where, however, the demise was originally that of the land only, the subsequent erection by the tenant of buildings thereupon, out of which buildings no portion of the rent payable to the landlord issues, ought not to have the effect of altering the *forum*.

Suits to recover possession of Land with *Mesne* Profits.

A suit to recover possession of land with *mesne* profits from a person alleged to be a trespasser by reason of his having refused to surrender the land after the determination of his tenancy, is one in which the Civil Courts have jurisdiction, and a plea by the defendant that he is in respect of part of the lands a permanent ryot does not affect the question (*Harí Nath Das* v. *Asmat Ali*, VI B. L. R. App. 118; *Ram Lochan Das* v. *Mangle Sheikh*, W. R. Jan.—July, 1864, Act X Rul. 3; *Ram Gopal Muzímdar* v. *Sanders*, I W. R. Civ. Rul. 139; *Ram Chand* v. *Chandí Churn Dass*, *id.* 161; *Rai Udit Narain Singh* v. *Ram Saran Rai*, *id.* 221; *Bídhúbúdín Mukherjí* v. *Dúrga Maní Debya*, II W. R. Civ. Rul. 157; *Makújú Nashya* v. *Dahar Mahomed*, *id.* 52; *Pír Mahomed and another* v. *Chandrabatí Chaudhrain and others*, VII W. R. Civ. Rul. 155; *Pado Maní Dasí* v. *Jholla Pally and others*, *id.* 283; *Sirbeshir Dey and*

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[1] IX B. L. R. App. 13.
[2] I W. R. Civ. Rul. 223.
[3] IX B. L. R. App. 14.

others v. *Fakír Mahomed*, *id.* 243; *Tarachand Targar* v. *Loknath Dutt and others*, VII W. R. 414; *Hari Nath Das* v. *Asmat Ali*, VI B. L. R. App. 118).

A suit for declaration of *title* under a *mauraṣi* lease is cognizable by the Civil not by the Revenue Courts (*Bissambher Boit* v. *Okúr Panday*, IV W. R. Civ. Rul. 105). A suit by the purchaser of a transferable tenure for a declaration of his title and to recover possession is cognizable by the Civil not by the Revenue Court: and generally where a person claiming a tenure sets out his title and seeks to have his right declared and possession given him in pursuance of that title, the Civil Court has jurisdiction, whether there is a claim for *mesne* profits or not (*Gúrú Dass Rai* v. *Bishtu Churn Bhattacharjya and others*, VII W. R. Civ. Rul. 187 (Full Bench); *Nobin Kishan Mukherjí* v. *Sib Persad Pattack*, VIII W. R. Civ. Rul. 96; *Rájá Anundnath Rai Bahadúr* v. *Janmajai Biswas*, *id.* 240; *Laljí Sahú and others* v. *Bhagwan Dass*, *id.* 337; *Dhoneí Mundal* v. *Aríf Mandal*, IX W. R. 306; *Taranath Bhattacharjya* v. *Obhai Charn Haldar and others*, VII W. R. 471; *Bani Madhub Banerjí* v. *Jai Kissen Mukherjí*, IV W. R., Act X Rul. 17 (Here the relation of landlord and tenant was expressly denied); *Seodan Singh* v. *Sithal Singh*, N-W-P. S. D. A. Rep. for 1865, p. 282). The Civil Court has jurisdiction in a suit brought by a zemindar to try the question of the *mokurrerí* title set up by tenants, who, being ousted by him, had recovered possession under section 23, Act X of 1859 (*Lalla Gokul Persad* v. *Raja Rajendro Kishnore Singh*, W. R., Jan.—July, 1864, Act X Rul. 4; and see *Umachurn Dutt* v. *Beckwith*, V W. R., Act X Rul. 3).

Where title in Dispute, although no claim for *Mesne* Profits.

A suit by one of several co-proprietors entitled to rent against his co-proprietors to recover his *share of the rents* collected by them, must be brought in the Civil Court (*Subal Singh* v. *Míta Singh*, W. R., Jan.—July, 1864, Act X Rul. 12; *Lalla Isrí Persad* v. *Stuart*, *id.* 28; *Syud Heider Ali* v. *Amrit Chaudhrí*, *id.* 42; *Syud Sharufat Ali* v. *Sheikh Ramzan*, *id.* 53): and so also a suit by one co-sharer for the rent of land held by another co-sharer (*Mittar Lall Sahú* v. *Sheikh Nadar*, I W. R. Civ. Rul., 53). But a suit by a *lumberdar* for his share of the profits against another *lumberdar* in the North-West Provinces is cognizable by the Revenue Court under Act XIV of 1863 (*Mahomed Gous* v. *Mussamat Kariman Nissa*, I N-W-P. Rep., Rev. Rul. 52; and see also *Zakal Dass* v. *Balmokand*, N-W-P. S. D. A. Rep. for 1864, p. 592).

Suit against a co-proprietor for share of the rent.

In order to see whether the Civil or the Revenue Court has jurisdiction, the cause of action stated in the plaint and the remedy sought

by the plaintiff, and not the defence set up by the defendant, are, as a general rule, to be looked to (*Watson & Co.* v. *Hedger*, W. R., Jan.—July, 1864, Act X Rul. 25; *Nobin Chandra Rai Chaudhrí* v. *Bhowaní Persad Dass*, *id.* 52; *Gobind Chandra Mazimdar* v. *Bissambherí Dasí*, II W. R., Act X Rul. 5; *Hari Nath Das* v. *Asmat Alí*, VI B. L. R. App. 118; *Dayal Chandra Ghose* v. *Dwarkanath Mitra*, W. R. Special Number 47). When the suit is brought in the Revenue Court on an allegation of the existence of the relation of landlord and tenant, and this relation is denied, the Court should first judicially decide the issue so raised and take jurisdiction accordingly (*Hari Persad Malí* v. *Kunjo Beharí Saha and others*, W. R. Special Number 29).

Jurisdiction how determined generally.

The decision of the Revenue Courts is final and conclusive on matters which fall properly within their jurisdiction and which form the subject of a suit judicially tried, and in which an appeal lies to the District Judge (*Umachurn Dutt* v. *J. Beckwith*, I R. C. and C. R. Civ. Rul. 58 and V W. R., Act X Rul. 3; *Sonatun Rai and another* v. *Ananda Kumar Mukherjí and others*, II B. L. R. App. 31), "It is clear that the Judge had no power, as a Court of original jurisdiction, to try the question whether the rent was due or how much was due, because that jurisdiction was taken away from the ordinary Courts of Judicature by Act X of 1859, and transferred to the Revenue Courts, and they were made the sole and exclusive Courts for the purpose of trying suits for rent." *Mussamat Edan* v. *Mussamat Bechan*, VIII W. R. Civ. Rul. 175, and II Jur. N. S., 264: see also *Tekaitní Gaura Kumarí* v. *The Bengal Coal Company*, V B. L. R. 667, note).

In the following cases the Revenue Courts were held to have jurisdiction:—Where *abatement* of rent was claimed as also a *refund* of excess rents paid for land said to have been diluviated—(*Barry* v. *Abdúl Alí*, W. R., Jan.—July, 1864, Act X Rul. 64; but see *Madhab Chandra Bidya Rattan* v. *Tara Sandari Guptí*, II W. R., Act X Rul. 92):—where a *refund* was sought of so much of the rent as issued out a portion of the land demised, the possession of which the plaintiff alleged had not been given to him (*Sarba Chandra Dass* v. *Umanand Rai*, XI W. R. 412; and see *Prosanno Mayí Dasí* v. *Súndar Kumarí Debya*, II W. R., Act X Rul. 30):—a suit for *arrears* of the rent of a *hât*, the land upon which the *hât* was established being the subject of the demise (*Gaitrí Debya* v. *Tukúr Dass*, W. R., Jan.—July, 1864, Act X Rul. 78):—a suit for arrears of rent brought against the *surety* of the *lessee* (*Bhúban Mohun* alias *Prolad Sandyal* v. *Bhúleo Sandarí Debí Chaudhrain*, VIII W. R. 452):—a suit to *cancel a lease* on account of the breach of the conditions thereof, and for arrears of rent (*Raní Belsarí Kúmárí* v.

Other cases in which Revenue Courts have Jurisdiction.

Subran Singh, II W. R., Act X Rul. 12; *Ram Chandra Dutt* v. *Díndiyal Paramanick*, *id.* 16):—for *abatement* of the rent of a *patní talúk* (*Ramnarain Banerjí and others* v. *Jaya Krishna Mukerjí*, B. L. R. Sup. Vol. F. B. 70; *Man Garobiní Dasí* v. *Khetar Chandra Ghose*, II W. R., Act X Rul. 47):—for arrears of rent *assigned* in a suit by the *assignee* (*Kishan Kúmar Mitter* v. *Mahesh Chandra Banerjí*, W. R., Jan.—July, 1864, Act X Rul. 3; *Shama Sundarí Dasí and others* v. *Bindabun Chandra Muzumdar*, Marsh. Rep. 199; see also *Ashutosh Chakravartti* v. *Baní Madhub Mukherjí*, V W. R., Act X, Rul. 34):—so when payment to the assignee was pleaded to a suit by the landlord (*Purna Chandra Rai* v. *Nand Lal Ghose and others*, VII W. R. 25):—where the defence was that the tenant had lent money to his landlord on a bond which stipulated that a portion of the rent should be applied in satisfaction of this debt (*Mussamat Edan* v. *Mussamat Bachan*, Marsh. Rep. 409; *Eshan Chandra Sen* v. *Kenaram Ghose and others*, XII W. R. 381):—in a suit for an illegal distress upon an under-tenant by the superior landlord of his lessor (*Gholam Alí* v. *Nanda Za*, Marsh. Rep. 264):—for the *value of a number of mangoes*, which it was stipulated in the *kabúlyat* should be supplied yearly, such stipulation being held to be really for the payment of a part of the rent in kind (*Naba Taríní Dasí and others* v. *Gray*, XI W. R. 7):—for the rent of *land held in excess* of the demise, there being no express contract in a written lease defining the lands to which the tenancy extended (*Sham Juh* v. *Durga Rai and others*, VII W. R. 122; see also *Raj Mohun Bose* v. *Issur Chandra Saha*, VI W. R., Act X Rul. 19):—for a kabúlyat for a *fishery* (*Kailass Chandra Dey* v. *Jai Narain Jalua and others*, VII W. R. 193):—or to *enhance* the rent of a *fishery* (*Paran Santra* v. *Tajudín*, V W. R., Act X Rul. 20):—a suit for the *recovery of possession* by a ryot having a right of occupancy, illegally ejected by his *zemindar* (*Ram Bhajan Bhakat* v. *Ketai Ram Chaudhrí and others*, VI W. R., Act X Rul. 21; *Khajah Asanúla* v. *Abhaí Chandra Rai*, XIII Moo. In. Ap. 317):—or to recover *possession of land with a hut* upon it, the hut being a mere appendage and matter of accident, (*Matingíní Dásí* v. *Haradhun Dass*, V W. R., Act X Rul. 60).

Cases in which the Civil and not the Revenue Courts have jurisdiction.

In the following cases it has been decided that the Civil and not the Revenue Courts have jurisdiction:—Where plaintiff sued to eject the defendant as a *trespasser* and the defendant pleaded that he was the plaintiff's tenant (*Nabin Chandra Rai Chaudhrí* v. *Bhawaní Persad Dass*, W. R., Jan.—July, 1864, Act X Rul., 52; *Gabind Chandra Majumdar* v. *Bissambheri Dasí*, II W. R. Act X Rul. 5):—where one ryot sued another ryot for *possession*, and the zemindar had nothing to say to the case, except that he was called as a witness (*Radhanath Majumdar* v. *Parikhit Badrik*, W. R. Jan.—July, 1864, Act X Rul. 60; *Kali Dass Banerjí* v. *Bonomali*

Dass, *id.* 61; *Magazal Hosen* v. *Jasúdak Ali Khan*, *id.* 89; *Watson & Co.* v. *Lal Mahomed Bishwass*, Sev. Aug.—Dec. 1863, p. 217; *Telak Chand Oswal* v. *Gour Chandra Saha*, II W. R., Act X Rul. 100): and generally when the dispossession is the act not of the landlord but of a third party (*Mussamat Amirta* v. *Nanda Kishore*, III N-W-P. Rep. 333; *Mahomed Jakhí* v. *Gopi Rai and others*, X W. R. 5) (Here the landlord was made a co-defendant with third parties), and so *Srikant Chaudri* v. *Kitabúdín Sirdar and others*, X W. R. 49; *Magní Rai* v. *Lal Khuní Lal*, VI W. R., Act X Rul. 19):—a suit for a perpetual pattah (*Kailash Chandra Dey* v. *Kailash Chandra Sen*, W. R., Jan.—July, 1864, Act X Rul. 94):—where the *right to collect* rents as a sharer or joint owner of the estate is the point in issue (*Hara Chandra Rai* v. *Abhai Chandra Sirkar*, II W. R., Act X, Rul. 72):—a suit for *specific performance* of the conditions of a lease (*Abdúl Ganí* v. *Gúdrí Rai*, III N-W-P. Rep. 192; *Ahmad Khan* v. *Massamat Gúmaní Begum*, II N-W-P. Rep. Civ. Rul. 181; *Madhab Chandra Sirkar* v. *Benod Mohan Chaudhrain*, II Sev. 752):—or of an agreement to give a lease (*Bharat Chandra Sen* v. *Achím-u-dín*, II R. C. and C. R. 207):—or for the restoration of the land to its original condition by the *removal of trees* planted contrary to the terms of the demise (*Johna Singh* v. *Neaz Begum*, III N-W-P. Rep. 183):—or for a declaration of a ryot's *right to cut and make use of trees* on the borders of his holding (*Pachia* v. *Mahamed Jala Asadúla*, II N-W-P. Rep. Civ. Rul. 217):—a suit for declaration of right to the produce of trees planted by a person whose interest the plaintiff had purchased (*Ramzanalí* v. *Syud Anwar Alí*, XI W. R. 52):—a suit to enforce an alleged right to erect *golahs* at certain *ghâts* and collect dues from persons using them (*Furlong* v. *Jaharí Lal*, Marsh. Rep. 194):—a suit to set aside a *lease* as being granted *without authority* (*Tajah Mahomed Pardhan* v. *Jagendra Deb Raikat*, VIII W. R., Act X Rul. 368):—a suit having for its object the relinquishment of a lease taken for a definite term on the ground that the lessee was induced to take it by *fraud* and *misrepresentation* (*Bholanath Khan and others* v. *Ram Sirkar*, VII W. R. Civ. Rul. 62):—or for *damages* under similar circumstances (*Nilmaní Singh and others* v. *Issur Chandra Ghosal*, IX W. R. 92):—or to *set aside a kabulyat* on the ground that it is a *forgery* (*Shah Mahamúd Lashkar* v. *Pahar Khan*, Marsh. Rep. 496):—and so as to a pattah (*Kabírudín* v. *Kissan Dhun Chakravartti*, III W. R. Civ. Rul. 309):—where it was sought to make a person liable for the rent of a tenure on the allegation that it was purchased *benamí* for him, that he had a *beneficial or equitable interest* therein, and was in equity liable for the rent (*Prasanna Kúmar Paul Chaudhrí* v. *Kailass Chandra Paul Chaudhrí*, II Jur. N. S. 327; VIII W. R. Civ. Rul. 428; V R. C. and C. R., Act X Rul. 2; see also *Kishan Bhutan Misrain* v. *Hickey*, XI W. R. 406, and *Mahomed Kadir* v.

Gopal Lal Takur, II Sev. 861; and distinguish *Hira Lal Bakshí* v. *Rajkiskore Mazímdar and others*, W. R. Special Number 58, in which the Revenue Court was held to have jurisdiction, the simple question being whether one of two persons took a lease *benamí* for another, or in other words, was an agent or principal in the transaction. Distinguish also *Bepin Beharí Chaudhrí* v. *Ram Chandra Rai and others*, V B. L. R. 235):—a suit for arrears of rent due on the *lease* of *tolls* on a canal (*Garland* v. *Rai Mohan Hazrah*, I W. R. Civ. Rul. 15):—or on account of an *indigo factory*, the rent issuing out of the *factory* not the land (*Addit Chandra Pal and others* v. *Kamalakanth Pal and others*, Marsh. Rep. 401):—or for an iron mine (*Khalat Chandra Ghose* v. *Minto*, I Jur. N. S. 426):—or for a legal *due* or *cess*[1] payable for the privilege of selling *pán* on *hát* days (*Harish Chandra Kúnd* v. *Gopal Baría*, III W. R., Act X Rul. 158):—a suit to recover rents wrongfully collected by a person *not the agent* of the *zemindar* and having no authority from him (*Síthal Krishto Rai* v. *Gopinath Saha and others*, Marsh. Rep. 465; *Kadambiní Dasí* v. *Bhagobatí Churn Ghose and another*, X W. R. 7):—a suit to assess alleged *lakheraj* land on the ground that it is held under an invalid grant, such grant bearing date prior to 1st December, 1790 (*Múrúbhí Sahú* v. *Latú Kúmar*, W. R. Special Number 70):—a suit for the ground-rent of the land occupied by a *golah* (*Dilawar Ali* v. *Debí Persad*, XI W. R. 203):—for *damages* for the wanton destruction of trees, even though stipulated for in the *kabúlyat* (*Naba Taríní Dasí and others* v. *Gray*, XI W. R. 7):—a suit for recovery of *possession by a lakherajdar* against the zemindar in whose estate the alleged *lakheraj* land is situate, and who is averred to have illegally dispossessed the plaintiff (*Gúrú Persad Rai and others* v. *Nimei Churn Palshain*, III W. R., Act X Rul. 5):—a suit for *possession of an under-tenure by a person who had purchased* the same and had never obtained any real possession, the title purchased being contested (*Rájá Anandnath Rai Bahádúr* v. *Janmajai Bishwass*, VIII W. R. 240):—or for possession by a *purchaser from a tenant* whose right to transfer is denied by the zemindar (*Kanai Múlla* v. *Debnath Rai*, III W. R. Act X Rul. 161):—or for the recovery of possession on expiry of assignment of land *assigned for a term* of *years* as security for a loan and as the means of its re-payment (*Kheter Mohan Pal* v. *Ram Kumar Pal*, V W. R., Act X Rul. 2):—or for the recovery of possession of a building used as a shop, and for rent thereof (*Ram Churn Singh Khetrí* v. *Meah Dhan Darzí*, IV R. C. and C. R. 65):—a suit for the recovery of *zemindari dâk* charges, though payable by the terms of a *kabulyat* (*Rattan Maní Dasí and others* v. *Jotendro Mohun Takur*, VI W. R. Act X Rul. 31; and see *Saroda Sundari Debya* v. *Umachurn Sirkar*, III W. R. S. C. C. Ref. 17):—a suit

[1] As to Revenue Courts having no jurisdiction in suits to recover cesses over and above the rent, see *Arjan Sahú* v. *Anand Singh and another*, X W. R. 257.

against *Shikmí talúkdars* by the *zemindar* to compel the payment of their *share of the revenue*, these *talúks* being separate from the zemindar's estate on the Collector's *taujíh*, and the payment of revenue through him being merely a matter of convenience (*Chandra Kanth Chakravartti* v. *Jai Gopal Chakravartti and others*, IV W. R. Act X Rul. 41; and see Sections 5, 6, and 7 of Bengal Regulation VIII of 1793):—a suit to set aside a decree obtained by *fraud* in the Revenue Court (*Aughor Lal Shamant* v. *Gyanand Rai*, VI W. R. Act X Rul. 11):—a suit by the *assignor* of a lease against his *assignee* to recover the landlord's rent which the former had to pay, the latter having agreed and failed to do so (*Radha Kishor Sirkar* v. *Jagarnath Rai Chaudhri*, V W. R, Act X Rul. 721):—where distraint is made by a person between whom and the defaulting tenant the relationship of landlord and tenant does not exist (*Raushan* v. *Bholanath Dass*, V W. R., Act X Rul. 67).

Jurisdiction of Courts of Small Causes.

Courts of Small Causes in the Mofussil have jurisdiction if the defendant at the time of the commencement of the suit shall dwell or personally work for gain or carry on business within the local limits of the jurisdiction of such Court; *or if the cause of action arose within the said local limits, and the defendant, at the time of the commencement of the suit, shall, by his servant or agent, carry on business or work for gain within those limits* (Section 8, Act XI of 1865). Where the cause of action arose within the local limits, but the defendant does not either personally or by his servant or agent carry on business or work for gain within such limits, it is clear that the ordinary Civil Court has, and the Court of Small Causes has not, jurisdiction. The distinction is not always attended to, more especially by Munsifs vested with Small Cause Court powers up to Rs. 50 under Section 29, Act VI of 1871[1] (and see III Mad. Rep. 24). The suits cognizable by a Court of Small Causes are claims for money due on bond or other contract, or for rent other than the rent of land for which a suit may be brought in the Revenue Courts,[2] or for personal property, or for the value of such property, or for damages, when the debt, damage, or demand does not exceed in amount or value the sum of five hundred rupees. The Local Government may, however, extend the limit of pecuniary jurisdiction to an amount not exceeding one thousand rupees. These Courts have no jurisdiction on a balance of partnership account[3] unless the balance have been struck by the

[1] Where some of the defendants reside, but others do not reside, within the local jurisdiction, proceedings may be taken under Section 4, Act XXIII of 1861, to have the case tried as against all the defendants (*Khoda Baksh Mistri* v. *Beni Mandal and another*, VI B. L. R. 719, *note*).

[2] See Section 104, Act VIII (B. C.) of 1869.

[3] The adjustment of an account, it may be observed, can be proved by oral evidence and need not necessarily be in writing (*Púrnima Chaudhrain and others* v. *Nityanund Saha and others*, W. R. Special Number 82; B. L. R. Sup. Vol. 3; and see Section 59, *post*).

parties or their agents, nor for a share or part of a share under an intestacy, nor for a legacy or part of a legacy under a will, nor for the recovery of damages on account of an alleged personal injury, unless actual pecuniary damage shall have resulted from the injury (Sections 6 and 7, Act XI of 1865).

Cases in which they have jurisdiction.

On the construction of these sections a considerable number of cases have been decided. In the following suits it has been held that Courts of Small Causes have jurisdiction, *viz.*—for the *value of trees* cut down and removed, even though the question of *title* had to be incidentally adjudicated upon (*Raghúram Biswas and others* v. *Ram Chandra Dobay and another*, Suth. S. C. C. Ref. 51, and B. L. R. Sup. Vol. F. B. 34; *Sib Dín Tewarí* v. *Bakshí Ram Pertab Singh*, W. R. Jan.—July, 1864, Mis. Rul. 3; *Sambhú Chaudhrí* v. *Combs*, II W. R. Civ. Rul. 179; and see *Kenny* v. *Amírudín Mandal*, Suth. S. C. C. Ref. 14; and *Sukada Sundarí Debya* v. *Sarúp Sheik*, *id.* 17):—so for the value of crops illegally removed (*Ram Jíban Royí* v. *Shahazadí Begum*, IX W. R. 336; but see *Ammallú Ammal* v. *Subhú Vadiyar*, II Mad. Rep. 184):—in a suit by one of several joint owners of property against his co-sharers for his *share of the profits* (*Kandarí Joadar* v. *Manik Joadar and another*, Suth. S. C. C. Ref. 23; *Jainarain Manjí* v. *Madhú Súdhan Gorait*, II W. R. Civ. Rul. 134):—in a suit by one co-owner for his *share of the price* of personal property sold without his consent or authority by another co-owner (*Radhanath Saha* v. *Kaminí Sundarí Dasí*, II W. R. Civ. Rul. 37):—in a suit for *cattle* or for the value of cattle (Suth. S. C. C. Ref. 117, and II W. R. S. C. C. Ref. 5):—in a suit on an *instalment-bond* given for arrears of rent (*Rájá Shatt Charan Ghosal* v. *Mahomed Ali*; *Tariní Churn Rai* v. *Gopal Krishto Rai*, II W. R., S. C. C. Ref. 5, and Suth. S. C. C. Ref. 118):—in a suit to recover a thatch of less value than Rs. 500, such thatch being severed from the house and therefore movable property (*Rájkumar Mukhapadya* v. *Prannath Mukhapadya*, VII B. L. R. App. 41):—in a suit to *establish a right to movable property* (of value less than Rs. 500) seized and sold in the execution of a decree, such suit being brought after the rejection of a claim under Section 246 of Act VIII of 1859 (*Umesh Chandra Bose* v. *Madan Mohan Sirkar*, II W. R. Civ. Rul. 44):—in a suit on a *contract for the payment of a stipulated monthly sum* for the use of a path (*Uma Persad Saha* v. *Shumsher Sirdar Mihter*, IV W. R. S. C. C. Ref. 10; see also *Brice* v. *Toogood*, V W. R. S. C. C. Ref. 18):—or for payment of a sum in consideration of which plaintiff agreed to let defendant tap his date trees and appropriate the produce for a single season (*Debnath Ghose* v. *Pachú Múla*, VI W. R. Civ. Ref. 8):—when the amount claimed is within the limit of the Court's pecuniary jurisdiction, although the bond on which the claim is made be for a sum beyond

such limit (*Súkí Maní Debya* v. *Hari Mohan Mukherjí and others*, V W. R. Civ. Ref. 6; and see *W. Kuppu Chettí* v. *C. Chidambaba Mudalí*, III Mad. Rep. O. J. 170; *Ewart Latham & Co.* v. *Hají Mahomed Seddik*, III Bom. Rep. O. J. 133; and *Anantha Naraiyanappaiyan and others* v. *Ganapati Aiayan and others*, II Mad. Rep. 469): —where *rents were assigned* by way of mortgage for the liquidation of a bond-debt and the questions to be decided were as to the amount due on the bond and as to payment by means of the rents assigned (*Mohima Chandra Mukherjí* v. *Ram Churn Rai*, VI W. R. Civ. Ref. 16):—so where a simple money decree is sought, *although land be hypothecated* by the bond upon which the claim is based (*Dúrhyar Rai* v. *Dulsingar Singh*, XI W. R. 367):—in a suit by a *zemindor* against a *patnídar* for *dâk expenses* (*Maharajah Dheraj Mahtab Chandra Bahadúr* v. *Rájá Bínod Chaudhrí*, VIII W. R. 517; *Erskine* v. *Trílochan Chatterjí*, IX W. R. 518):—in a suit to recover the *purchase-money of land*, the vendor having failed to complete the bargain (*Charú Khan* v. *Dúrga Maní*, IX W. R. 498): —for *mesne* profits only, when no question of title or right arises (*Ram Piyarí Debya and another* v. *Dínanath Mukherjí*, II B. L. R., Short Notes xiii):—for damages for a *malicious prosecution*, special pecuniary loss resulting therefrom being alleged (*Sitarraman and others* v. *Susa Pillai and another*, II Mad. Rep. 254):—for damages in consequence of an injunction, there having been no award of compensation under Section 96, Act VIII of 1859 (*Nanda Kumar Saha* v. *Gaur Sankar and another*, V B. L. R. App. 4).

Cases in which these Courts have not jurisdiction.

In the following cases, on the other hand, Courts of Small Causes have been held to have no jurisdiction, *viz.*— where a set-off was pleaded which was in excess of the amount cognizable by a Court of this kind, and which also constituted a claim for rent cognizable by the Revenue Courts (*Kenny* v. *Nabin Chandra Bose*, Suth. S. C. C. Ref. 21):—where, in a suit for a *share of the rent of a house* which formed but a portion of the joint property, it was pleaded that plaintiff was indebted to the defendant for money received on account of such joint property (*Ram Kúmar Chaudhrí* v. *Shama Churn Chaudhrí and others*, Suth. S. C. C. Ref., 33):—where the claim was for *maintenance* settled by a will, and involved long and intricate investigations (*Tara Sundarí Debya* v. *Hara Sundarí Debya and others*, Suth. S. C. C. Ref. 66):—so also where the right to the *maintenance* had already been established in the regular Civil Court and arrears thereof were claimed (*Nabin Kalí Debya* v. *Bindú Bashiní Debya and others*, V W. R., S. C. C. Ref. 5; and see *Bhagwan Chandra Bose* v. *Bindú Bashiní Dasí*, VI W. R. Civ. Rul. 286, and *Kamini Dasí* v. *Bissonath Saha*, IX W. R. 214):—in a suit for the *half value of the crop* by a *ryot* who had sub-let his land on the

condition that the *sub-lessee* should supply the seed and the labour and give him half the crop when raised; but otherwise, if the relation of master and servant merely was created by the contract (*Srínath Dutt* v. *Dwarí Dhalli*, Suth. S. C. C. Ref. 113, and II W. R. S. C. C. Ref. 2; but see *Garíbúla Poramanic* v. *Fakír Mahomed Kholú*, X W. R. 203):—in a suit for the *price of bricks* carried away and for a declaration of title to half the real property (*Matharnath Goshwamí* v. *Gobind Mai Goshwamí*, IV W. R. Civ Rul. 58):—in a suit for debt against a Military officer in a cantonment, where there was a Court of Requests (*Abú Sait and others* v. *Arnott*, II Mad. Rep. 439; *Hosainí* v. *Lt. Dickenson*, IX W. R. 112; but see *Bastain* v. *Tireman*, 2 Mad. Rep. 389):—or against a native camp-follower (*Mastrudin* v. *Khúda Baksh*, X W. R. 386):—or against the wife of a soldier (*Keeffe* v. *Christie*, V W. R. S. C. C. Ref. 21; and see the provisions of the latest Mutiny Act):—in a suit by one *co-sharer of a revenue-paying estate* to recover from another sharer his proportion of the Government revenue paid to save the estate from sale (*Madhú Súdhan Muzimdar and others* v. *Bindú Basiní Dasí and others*, VI W. R. Civ. Ref. 15; *Bramarup Goswamí* v. *Prannath Chaudhri and others*, VII W. R. 17; *Kalinath Rai*, v. *Nila-Ram Poramanic*, VII W. R. 32; *Ram Buksh Chittangeo and another* v. *Madhu Súdhan Paul Chaudhrí and others* (Full Bench), VII W. R. 377, overruling *Ram Maní Dasí* v. *Piyarí Mohun Mazimdar*, VI W. R. Civ. Rul. 325):—for *specific performance* of a contract (*Nilkant Surma and others* v. *Bissen Basí and others*, VI W. R. Civ. Rul. 322):—for *contribution*, where the right to recover is founded merely on a *quasi*-contract (*Ram Baksh Chittangeo and another* v. *Madhú Sudhan Paul Chaudhrí and others* (Full Bench), VII W. R. 377; *Srípatí Rai* v. *Laharam Rai and others*, VII W. R. 384; *Sabú Meají* v. *Nurai Mulah and another*, VII W. R. 386; *Tamízudín Mirdha* v. *Gaffur Khan*, VII B. L. R. App. 40):—for *Salvage* (*Kishore Singh and others* v. *Ganesh Mukerjí*, IX W. R. 252; and distinguish *Grant and others* v. *Madhú Súdhan Singh and others*, X W. R. 79):—in a suit to recover *huts* purchased at a sale in execution or the value thereof (*Rahiní Kant Ghose* v. *Mahabharat Nag and others*, X W. R. 258; and see *Natú Meah and others* v. *Nand Raní* (Full Bench), VIII B. L. R. 508):—or for crops which have not been severed from the ground, for they are immovable property (*Mahomed Súlimaun Valid Mahomed Ishakbhai* v. *Satú Valad Harjí*, IV Mad Jur. 454; *Gopal Chandra Biswas* v. *Ramjan Sirdar and another*, V B. L. R. 194):—or for defamation of character, where there has not been any actual pecuniary loss (*Bheirub Chandra Chakravarttí* v. *Mahendra Chandra Chakravarttí*, IV B. L. R. App. 59; *Raj Chandra Chakravarttí and others* v. *Panchanan Surma Chaudhrí*, IV W. R. Civ. Rul. 7):—or for personal injury, where no actual pecuniary loss has resulted thereform (*Ali Baksh* and *another* v. *Sheikh Samírudín*, IV B. L. R. 31).

Courts of Small Causes in the Presidency Towns.

The constitution of Courts of Small Causes in the Presidency Towns is regulated by Acts IX of 1850, XX of 1857, XXVI of 1864, and VI (Bom. C.) of 1864. The jurisdiction of these Courts, as enlarged by Act XXVI of 1864, now extends to the recovery of any debt, damage, or demand not exceeding the sum of one thousand rupees, and to all actions in respect thereof except suits for libel, slander, matters connected with the revenue or acts done under the authority of Government or of judicial officers, provided that the cause of action have arisen or the defendant at the time of bringing the action dwell or carry on business or personally work for gain within the local limits of the jurisdiction of the Court. When the sum to which the plaintiff is entitled exceeds one thousand rupees, he may abandon the excess in order to sue in the Court of Small Causes; but, if the abandonment be not made beforehand and stated in the summons, the Court has no jurisdiction (*Gorachand Chandra Bose* v. *Charra Chandra Ghose*, I Cor. Rep. 93). Where both parties agree by a memorandum signed by them or by their attorneys, these Courts have power to try any action in which the debt or damage claimed or value of the property in dispute, whether on balance of account or otherwise, exceeds one thousand rupees (see Sections 2, 3, and 4 of Act XXVI of 1864, and Section 25 of Act IX of 1850).

Jurisdiction of the Regular Civil Courts.

The regular Civil Courts beyond the local limits of the Presidency Towns have jurisdiction in all suits of a civil nature, with the exception of suits of which their cognizance is barred by any Act of Parliament, or by any Regulation of the Codes of Bengal, Madras, and Bombay, respectively, or by any Act of the Governor-General of India in Council[1] (Section 1, Act VIII of 1859, The Code of Civil Procedure). "*Ubi jus, ibi remedium*" is the maxim of the law—*where* there is a right, *there* there is a remedy. "If the plaintiff has a right," said Lord Holt in the case of *Ashby* v. *White*," he must of necessity have a means to vindicate and maintain it, and a remedy, if he is injured in the exercise or enjoyment of it; and, indeed, it is a vain thing to imagine a right[2] without a remedy; for want of right and want of remedy are reciprocal." This language indicates broadly the two classes of cases in respect of which the Civil Courts have jurisdiction

[1] No mention is made of the Acts of the Legislative Councils of Bengal, Madras, and Bombay. They were created by the Indian Councils' Act, 1861, *i. e.*, two years after the passing of the above section. *Query*—Can the jurisdiction of the Civil Courts be barred by an Act of these local Legislatures?

[2] "Right,—the capacity or power of exacting from another or others acts or forbearances,—is nearest to a true definition. For all these reasons I say that a party has a right, when another or others are bound or obliged by the law, to do or to forbear, *towards* or *in regard of* him." (Austin, Lecture XVI, Vol. I, 410, and see for other definitions page 411.)

viz., (1) suits brought to vindicate, maintain, or enforce rights, and (2) suits brought to obtain damages for injury in the exercise or enjoyment of rights. In respect of both classes the regular Civil Courts have jurisdiction, unless such jurisdiction have been expressly taken away by the Legislature, as, for example, in the case of those suits which are cognizable by the Revenue Courts only. That there is no precedent for a particular action is not an argument which should prevent a Civil Court from exercising its jurisdiction. "Where cases are new *in their principle*, there I admit," said Ashurst, J., in *Pasley* v. *Freeman*, 3 T. R. 63, "that it is necessary to have recourse to legislative interposition in order to remedy the grievance; but where the case is only new *in the instance*, and the only question is upon the application of a principle recognized in the law to such new case, it will be just as competent to Courts of Justice to apply the principle to any case that may arise two centuries hence as it was two centuries ago." To enumerate all the cases in which, upon the application of these principles,[1] it has been held that the Civil Courts in India have jurisdiction, would occupy more space than the design of the present work will afford. I shall, however, mention a few cases in which the doubt which formerly prevailed has been removed by recent decisions; or which, by reason of their special importance, are deserving of special notice. Before doing so, however, it may be well to observe that all regular Civil Courts in India have full powers to afford a complete remedy in all cases which are within their cognizance; and that the distinction between Common Law and Equity, which in England has created two separate sets of tribunals, in one of which at least a complete remedy too often is not to be had, has no existence in India. The regular Civil Courts have been held to have jurisdiction to entertain a suit for declaration that an alleged *Hindu marriage* is invalid (*Aunjona Dasi* v. *Prahlad Chandra Ghose and others*, VI B. L. R. 243):—or for the *restitution of conjugal rights* (*Múnshi Bazlúr Rahím* v. *Shamsúnissa Begum*, XI Moo. In. Ap. 551; *Chatan Bibi* v. *Amir Chand*, VI W. R. Civ. Rul. 105):—or for restitution to *caste* (*Ram Kanth* v. *Ram Lochun Acharjya*, p. 535 of the Rep. of the Ben. S. D. A. for 1859; *Sonaúla Kolal* v. *Muhassan Kolal*, p. 541 of Rep. of Ben. S. D. A. for 1848; *Gopal Garain* v. *Garain*, VIII W. R. Civ. Rul. 299):—or for a declaration of exclusive right to the privilege of administering *purohetum* or religious service to pilgrims resorting to a shrine, such right being capable of alienation or delegation, and being in the nature of a proprietary right (*Sunkur Bharti Sivami* v. *Sidha Lingaya Charanti*, III Moo. In. Ap. 198):—or

Some cases in which the Regular Civil Courts have jurisdiction.

[1] The student is recommended to read, in connection with what has been said above, the case of *Ashby* v. *White and others*, and Mr. Smith's Note thereto, I Leading Cases, 216.

in respect of a right to offerings collected at shrines or temples (*Raní Sadat Kaur* v. *Jawalla Persad*, p. 720 of Rep. of Ben. S. D. A. for 1861; *Madhabí Panda and another* v. *Búdí Maha Pathur*, p. 1820 of Vol. II of Ben. S. D. A. Rep. for 1856):—for a share of the fees obtained by a joint family of *purohits* on the ground that a partnership existed between the plaintiff and defendants, or that they are bound by a contract express or implied to share their earnings (*Magjú Pandaen* v. *Ramdyal Tewarí and others*, VIII B. L. R. 50; *Khedrú Ojha and another* v. *Mussamat Deo Raní Kúmar*, V W. R. Civ. Rul. 222; *Becharam Banerjí* v. *Srímatí Takúr Maní Debya*, VIII B. L. R. 53, *Note*, and X W. R. 114; *Jawahir Misser* v. *Bhagú Misser*, p. 362 of Ben. S. D. A. Rep. for 1857):—for damages for mere verbal abuse, which may injure or outrage the feelings (*Gaur Chandra Patitandí* v. *Clay*, VIII W. R. Civ. Rul. 256; *Kalí Kúmar Mittra* v. *Ramgatí Bhattacharjya and another*, VI B. L. R. App. 99; *Sheikh Takí* v. *Sheikh Khoshdel Biswass*, VI W. R Civ. Rul. 151; *Múlví Gholam Hosen* v. *Har Gobind Dass*, I W. R. Civ. Rul. 19):—for damages against a Magistrate who has not acted reasonably, carefully and circumspectly in the discharge of his duties (*Vinayak Divikar* v. *Bai Itcha*, III Bom. Rep. 36):—nor with good faith (*Vinayak Divakar* v. *Armstrong*, III Bom. Rep. 47):—for damages in respect of an act which amounts to a *criminal offence*, although no criminal prosecution have been instituted, there being no Act of the Legislature which bars the cognizance of such a suit and the Civil Courts not being at liberty to act upon their own notions of policy (*Shama Churn Bose* v. *Bhola Nath Dutt*, VI W. R. Civ. Ref. 9; but see as to the High Court on its original side, *Kunamal* v. *Sarna Raur*, II Jur. N. S. 187):—to recover money obtained by extortion (*Ramgati Dass* v. *Gholam Ahmed Khondhar and others*, W. R. Special Number 85):—to set aside a registered mortgage-deed and have it declared a forgery, the alleged registration being held to cast a cloud on plaintiff's title and depreciate the value of his property (*Fakir Chand* v. *Takúr Singh*, VII B. L. R. 614):—for maintenance by a Hindú wife notwithstanding the provisions of the Code of Criminal Procedure in this behalf,—see Chap. XLI, Sections 536—538, Act X of 1872—(*Lalla Gopínath* v. *Mussamat Jítan Kúar*, VI W. R. Civ. Rul. 57):—in a suit against Government for the wrongful dismissal of one of its servants (*Hughes* v. *The Secretary of State for India in Council*, VII B. L. R. 688):—in a suit to recover money paid in satisfaction of a decree otherwise than into Court, the decree-holder not having certified the payment to the Court and having sued out execution notwithstanding (*Gunamaní Dasí* v. *Prankishorí Dasí* (Full Bench) V B. L. R. 223, overruling *Jamír Mandal* v. *Brojonath Chakravartti*, Suth. S. C. C. Ref. 73, and *Alamja Bíbí* v. *Gúrú Churn Rai*, III W. R. S. C. C. Ref. 3; see also *Sújan Mandal* v. *Wazír Mandle*, VI W. R., Civ. Ref. 29, and *Bhagowan Tantí* v.

Gobind Chandra Rai, IX W. R. 210). A Full Bench of the Madras High Court have ruled, on the contrary, that such a suit is not maintainable (*Arunachella Pillai* v. *Appavú Pillai*, III Mad. Rep. 188).

Cases in which the Civil Tribunals have not jurisdiction.

The Civil tribunals have no jurisdiction to entertain a suit brought to obtain a declaration of right to the membership of a *somaj* or society, exclusion therefrom not affecting any right of property nor bringing deprivation of caste (*Sadharam Patar* v. *Sadharam and others*, III B. L. R. 91; *Jai Chandra Sirdar and another* v. *Ramchurn and others*, VI W. R. Civ. Rul. 325):—or for declaration of a right to be summoned to all marriages and to receive a present of *pân* from the members of a particular community (*Ram Gatri Bishwass* v. *Mahadeo Banick*, p. 64 of Rep. of Ben. S. D. A. for 1850):—or for declaration of right to be shaved by the village barber (*Phagúna Nayí* v. *Menei Matha*, p. 465 of Rep. of Ben. S. D. A. for 1854):—or for a right to offerings made by *jujmans* to the *purohit* or family priest, such offerings being of a personal nature and the *jujmans* being at liberty to select their own *purohit* (*Ramakant Surma and others* v. *Gobind Chand Surma*, p. 398 of Ben. S. D. A. Rep. for 1852; *Lalla and others* v. *Ganeshí*, p. 509 of N.-W.-P. S. D. A. Rep. for 1856; *Rúdarman Misser* v. *Damudar Misser*, I Hay's Reports 365; and see *Nobin Chandra Dutt* v. *Madhab Chandra Mandal*, V W. R. Civ. Rul. 225):—for damages against a Magistrate acting judicially and with jurisdiction, although carelessly and irregularly (*The Collector of Húghlí and Iswar Chandra Mittra* v. *Tarakuath Mukhapadya*, VII B. L. R. 449, and see Act XVIII of 1850):—for the re-instatement of a *Ghatwal*, who has been dismissed by the Police authorities, in the lands which he formerly held as *Ghatwal* (*Debi Narain Singh* v. *Srikishen Sen and the Collector of Bírbhúm*, I W. R. Civ. Rul. 321): for compensation for loss sustained in consequence of a private *ferry* being resumed by Government and made a public ferry, Ben. Reg. VI of 1819 providing specially therefor (*The Collector of Patna* v. *Ramanath Takúr and others*, Full Bench, VII W. R. Civ. Rul. 191):—or where the act complained of is an act of State done by the Government, as a Sovereign power (*East India Company* v. *Kamachí Boye Sahiba*, Suth. Priv. Coun. Ap. 373).

Jurisdiction by change of venue.

By Section 5 of Act VIII of 1859 the Civil Courts have jurisdiction, if in the case of suits for land or other immovable property such land or property shall be situate within the limits to which their respective local jurisdictions may extend, and in all other cases if the cause of action shall have arisen, or the defendant at the time of the commencement of the suit shall dwell or personally work for gain, within such limits. Under Section 6 of the same Act the High Court, and in

some cases the District Judge, has power to transfer cases instituted in one Court to another Court, which acquires jurisdiction from such order of transfer. So, where portions of the same immovable property are situate in different local jurisdictions, the High Court in the case of property situate in more districts than one, and the District Judge in the case of property situate within the local limits of different Courts in the same district, can make an order for the trial of the suit as regards the whole property by any one of such Courts (Sections 11, 12, and 13). When land has been demarcated by the Survey Authorities as belonging to a particular district, it belongs *de facto* to that district, and all suits concerning it must be brought in the Courts having jurisdiction in such district; nor is this rule affected by the fact that the very object of the suit is to have the land declared to be part of an estate belonging to another district, and so to be situate within another local jurisdiction (*Srinath Dutt Chaudhri* v. *Dúrga Das Rai Chaudhrí*, Suth. Rep., Jan.—July, 1864, p. 360; *Radha Madhub Banerji* v. *Raja Damúdar Singh Audhaj*, id. p. 369; *Sham Kanth Lahorí Chaudhrí* v. *Bhagirutti Chaudhrain and others*, Hay's Reports, p. 485; *Kalí Kúmar Mukherjí* v. *The Maharajah of Burdwan*, V W. R. Civ. Rul. 39. But see *Radha Persad Singh* v. *Ram Jewan Singh and others*, XI W. R. 389).

Jurisdiction of the High Courts.

The *ordinary* original civil jurisdiction of the Calcutta High Court extends to suits of every description arising within the limits declared and prescribed by the proclamation fixing the limits of Calcutta, issued by the *Governor-General* in Council on the 10th September 1794 A. D., or such other local limits as may from time to time be declared and prescribed by any law made by competent Legislative authority for India, if, in the case of suits for land or other immovable property, such land or property shall be situated, or in all other cases if the cause of action shall have arisen either wholly, *or*, *in case the leave of the Court shall have been first obtained*, *in part*, within the local limits above-mentioned, or if the defendant at the time of the commencement of the suit shall dwell or carry on business, or personally work for gain within such limits (Sections 11 and 12 of the Letters Patent of 1865). Where leave is required, if such leave be not obtained previous to institution, the Court has no jurisdiction (*S. M. Jegadamba Dasí* v. *S. M. Padmamani Dasí*, VI B L. R. 686; *Harjiban Das and others* v. *Bhagwan Das*, VII B. L. R. 103). In the exercise of its *extraordinary* civil jurisdiction it has power to remove and try any suit being or falling within the jurisdiction of any Court, subject to its superintendence (Section 13, id). The Madras and Bombay High Courts have *ordinary* original civil jurisdiction within the local limits of the Presidency Towns of Madras and Bombay, respectively; and have similar extraordinary original civil jurisdiction. The High Court for the North-Western Provinces has no ordinary original civil jurisdiction,

but has similar extraordinary original civil jurisdiction (see the Letters Patent of these Courts, respectively).

Presumption as to Jurisdiction.

It is a rule in England that nothing shall be intended to be out of the jurisdiction of a *superior* Court but that which specially appears to be so, and that nothing is intended to be within the jurisdiction of an *inferior* Court but that which is expressly alleged. Where, therefore, it appears upon the face of the proceedings that an inferior Court has jurisdiction, it will be presumed that the proceedings are regular; but if it do not so appear,—if it appear affirmatively that the inferior Court has no jurisdiction, or, if it be left in doubt whether it has jurisdiction or not,—no such presumption will be made. It is necessary, therefore, for a party, who relies upon the decision of an inferior tribunal, to be prepared to show that the proceedings were within the jurisdiction of the Court.[1] This rule as to jurisdiction has been quoted and folllowed in India (see *the Queen* v. *Nabadwip Goswamí*, per Peacock, C.J., I B. L. R., Or. Crim. 30). The High Courts or Courts occupying a similar position in the Panjáb, Oudh, &c, are probably the only Courts which in India could be regarded as superior Courts within the rule.

The consent of parties will not give a Court a jurisdiction which it does not otherwise possess (*Kadambiní Dasí and others* v. *Dúrga Churn Dutt*, Marsh. Rep. 4). The jurisdiction of a Court to entertain and decide upon a cause of action depends upon the nature of the claim put forward by the plaintiff as his cause of action, and the matter involved in it; and does not depend upon what the defendant may please to assert by way of defence. It may turn out at a trial that the subject of contest between the plaintiff and the defendant is not properly represented by the form in which the plaintiff has chosen to put his claim: but the occurrence of that contingency will only render the plaintiff's suit liable to be dismissed as not proved; it will not affect the jurisdiction under which the suit, as brought by the plaintiff, fell (*Chandra Kumar Mandal and others* v. *Bakir Ali Khan*, IX W. R. Civ. Rul. 598).

Judgment must have been directly on the point.

II. In the second place the judgment, in order to be conclusive, must have been given directly on the point. The word "directly" is not used in the second section of the Code of Civil Procedure, but there can be no doubt that this essential portion of the rule also applies in India. The observations of the Lords of the Privy Council in the case

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[1] See *Peacock* v. *Bell*, 1 Saunder's Rep., by Williams, 74; *Gosset* v. *Howard*, 10 Adolphus and Ellis' Queen's Bench Rep. 453; *Kinning* v. *Buchanan*, 8 Common Bench Rep. 286; *Dempster* v. *Purnell*, 4 Scott's New Rep. 39; and *Stanton* v. *Styles*, 5 Welsby, Hurlstone, and Gordon's Rep. 583. The jurisdiction of an *inferior* Court, if it do not plainly appear, may be inferred by fair and necessary intendment (*In the matter of the Commissioners for the improvement of the Town of Calcutta*, I Boul. Rep. 565).

quoted above page 172, extend to the *whole* of the rule: and in the words of Lord Chief Justice DeGrey, "neither the judgment of a concurrent or exclusive jurisdiction is evidence of any matter *which came collaterally in question, though within their jurisdiction, nor of any matter incidentally cognizable, nor of any matter to be inferred by argument from the judgment.*" A sued B for the price of goods sold, for which B had before paid and obtained a receipt, which he was, however, unable to find. B was, therefore, compelled to pay the money over again. Having afterwards found the receipt, he brought an action against A to recover back the money so paid. It was held that the action would not lie (*Marriot* v. *Hampton*, 7 Term Reports 269; and see 2 Smith's Leading Cases, 356). Where a landlord sued his tenant for a *kabuliyat* at an enhanced rate of rent, and the latter pleaded that he was not a *ryot* but a *talúkdar*, and therefore not liable to enhancement, and the Revenue Court decided the question thus raised as incidental to the real point at issue as to the *kabuliyat;* and the tenant brought a suit in the Civil Court and obtained a decree declaratory of his rights as a *talúkdar*, and then sued in the Revenue Court for abatement of rent, it was held that the previous decision of this Court was not a bar to the trial of the abatement suit. "It cannot be said," it was observed, "because a Court of competent jurisdiction, in deciding upon a particular subject-matter, thought it necessary to go into collateral facts for the purposes of that decision, that the opinion of that Court on those collateral facts is conclusively binding in a subsequent suit which relates to a different subject-matter." (*Mahdú Ram Dey* v. *Beidonath Dass and others*, IX W R. Civ. Rul. 592.) A sued B in the regular Civil Court to recover damages for the taking away by the latter of some mangoes which grew on land to which A set up a right. The question of *title* thus raised was tried incidentally in the suit for damages and decided in favour of A. B subsequently brought a suit against A for a declaration of right and confirmation of possession, to set aside a survey award and to have a *takbast* map amended. "It is clear," said Peacock, C.J., "that the cause of action to recover damages for the mangoes, and a suit brought to have a declaration of right, and to set aside a *takbast* proceeding, are not the same; and the plaintiff is not barred by Section 2, Act VIII of 1859. Nor is he estopped by the decision in the suit relating to the mangoes upon a point which came collaterally in issue. It is contended that in that suit the plaintiff paid the stamp-duty upon a valuation not merely of the mangoes, which he sought to recover, but of the lands which he did not seek to recover. 'But the fact of the plaintiff's having paid a higher stamp-duty in that suit than he was by law bound to pay, cannot affect the rights of the parties in the present suit (*Mahima Chandra Chakravartti* v. *Raj Kúmar Chakravartti*, I B. L. R., A. C. 4). Here it will be observed that the regular Civil Court (it was a Munsif's Court) would have had jurisdiction in

the first case to try the title to the land if the value thereof were within the pecuniary limits of its jurisdiction; and the decision on the question of title was held not to have the force of an estoppel in the second case, because it had been given upon a *collateral* point. In the case of *Raghúram Biswas and others* v. *Ram Chandra Dobey and another*, Suth. S. C. C. Ref. 51, which was a suit to recover damages for the value of some mangoe trees cut down and removed by the defendant, it was held by a Full Bench that a Court of Small Causes could try the question of the title to the land as an incidental question, the decision of which was necessary to the adjudication on the claim for damages; but it was remarked that the judgment on this point would not be conclusive except so far as regarded the right to the damages claimed. Here the point, besides being a collateral one, was also one which the Court of Small Causes had no jurisdiction to try definitively. So where in a suit for rent the defendant pleaded a bond authorizing him to appropriate a certain portion of his rent in reduction of the amount due to him under the bond, the decision of the Revenue Court as to the genuineness of the bond was held not to be a bar to the trial of the same question by the Civil Court in a suit on the bond between the same parties, the Revenue Court not being a Court having jurisdiction concurrent with that of the Civil Court to decide the question. "It is unnecessary for me, "said Peacock, C.J.," to determine whether the matter did or did not come collaterally in question before the Collector. If it were necessary for me to determine that question I should say that it did. But I think it unnecessary to determine that question, because it is clear that the Courts are not Courts of concurrent jurisdiction (*Massamat Edan* v. *Massamat Bechan*, VIII W. R. Civ. Rul. 175, and II Jur. N. S. 264; and see also *Khagauli Singh* v. *Hosen Baksh Khan*, VII B. L. R. 680, quoted *ante*, p. 178; *Ram Chandra Gúpto* v. *Bhagobati Debya*, II W. R., Act. X., Rul. 85—Incidental decision of *lakheraj* title by the Revenue Courts).

Judgment conclusive only between same parties or their privies.

III. In the third place, the judgment is conclusive only between the same parties, or (as the second section of the Code of Civil Procedure adds) between parties under whom they claim. "The verdict ought to be between the same parties, because otherwise a man might be bound by a decision, who had not the liberty to cross-examine; and nothing can be more contrary to natural justice than that a man should be injured by a determination that he, *or those under whom he claims*, was not at liberty to controvert."[1] There is, however, no hardship in holding that a man shall be bound by that which would have bound those under whom he claims *quoad* the subject-matter of the claim; for *qui sentit commodum*

[1] Buller's Nisi Prius, 233.

sentire debet et onus,[1] and no man can, except in certain cases excepted by the Statute Law and the law merchant, transfer to another a better right than he himself possesses.[2]

A decision for or against a man in one capacity, as for example, in a representative character, will not have the force of *res judicata* for or against him when suing or sued in a wholly distinct capacity. A suit for possession of immovable property with *mesne* profits brought against A and her father, and subsequently revived against A as her father's representative, was decreed against A in her representative capacity and dismissed as against her in her individual capacity. The decree-holder, in order to realize the *mesne* profits, attached and sold A's own private property notwithstanding her objections. In a suit by A for cancellation of this sale and for confirmation of possession of this her private property, it was held that A was not, in her individual capacity, a party to the suit in which execution had issued, and that she was entitled to maintain this action (*Sheikh Wahid Ali* v. *Mussamut Jamayi*, II B. L. R., F. B., 74; see also *Haris Chandra Gupto* v. *Srímati Shashi Mala Gupti*, VI B. L. R. 721). A Hindú female, who had succeeded to her father's estate, transferred it to her grand-daughter by a deed in the nature of a release, reserving maintenance and other advantages to the donor. Subsequently, having quarrelled with the grand-daughter, she brought a suit to set aside this deed on the ground of non-performance of the conditions. While the case was pending in appeal, the plaintiff died, and the *reversioners* were admitted to conduct the appeal in her stead. The grand-daughter subsequently died, and one of these reversioners sued to recover the property by right of inheritance from the alienor's father. It was held that he was not estopped by the judgment in the previous case, for that the reversioners merely represented in that suit the interest of their predecessor, the life-tenant (*Mussamat Raj Kunwar* v. *Mussamat Inderjit Kunwar*, V B. L. R. 586). So a suit by a reversioner (who was the heir presumptive after the widow in possession) to set aside a sale of the widow's life-estate is no bar to a suit by the same person after her death to establish his rights as reversioner (*Dúrga Churn* v. *Kasi Chandra Moitri*, Marsh. Rep. 539). As to whether a plaintiff can show that the defendant on the record was really acting *benami* for him, and as to how far a decree is conclusive not only as to the rights of the parties but as to the *character* in which they sue, see *Bhawahal Singh* v. *Maharaja Rajendra Pratab Sahai*, V B. L. R. 321.

Privies.

A Hindú widow fully represents the estate, and the reversionary heirs are, in the absence of fraud or collusion, bound by judgments obtained against

[1] "He who feels the advantage ought also to feel the burden."

[2] 2 Smith's Leading Cases, 664.

her (*Kattama Natchiar* v. *Rájá Mútú Vijaya Raganadha Bodha Gúrú Swamy Periya Odaya Taver* (the *Shivagunga* case), IX Moo. In Ap. 539; *Goluck Mani Debya* v. *Digamber Dey*, II Boul. Rep. 193; *Nobin Chandra Chakravarttí* v. *Issur Chandra Chakravarttí and others* (Full Bench), IX W. R. Civ. Rul. 505). A man died leaving two sons, A and B; and his property was taken possession of by C, who claimed under a will alleged to have been made by him. A brought a suit against C to set aside the will, and made B a *pro formâ* defendant. This suit was dismissed, the will being found to be genuine. B subsequently brought a suit against C to recover his share, as heir to the deceased; and it was held that this suit was not estopped by the judgment in the former suit in which A was plaintiff. It was observed that B could not, in any manner, have availed himself of the decree in that suit to enforce his claim to a share of the inheritance; that he could not have appealed from that decree; and that he was, therefore, in no way bound by the findings of the Court therein (*Nobin Chandra Muzímdar* v. *Mukta Sundarí Debya and others* VII B. L. R. App. 38). It will be observed that, though A and B were in the first suit arrayed on different sides, their interests were not adverse; see also *Price* v. *Khilat Chandra Ghose* V B. L. R. App. 50. With these cases may well be contrasted, *Deokí Nandan Rai* v. *Kalí Persad and others*, VIII W. R. Civ. Rul. 366, in which a certain estate, the joint property of A, B, C, D, and E, having been sold for arrears of revenue, the *surplus* sale-proceeds were in deposit in the Government Treasury. In execution of a decree obtained against A and B jointly, their share in these sale-proceeds in deposit was sold and purchased by K, who brought a suit against A and B as principal defendants, making C, D, and E *pro formâ (ikhteatan)* or precautionary defendants, to have it declared that he was entitled to draw the share (of the money in deposit) which he had purchased. K obtained a decree without any qualification as to the rights of C, D, and E in the share, which he had claimed as belonging to A and B. C subsequently sued K to establish a mortgage over the whole estate and a lien in respect thereof upon the very sale proceeds for which K had obtained a decree. It was held that C was estopped by the decree in the first suit. It was observed that, if C's claim were well-founded, it would have constituted a good defence to the action brought by K against C and others; and that it was C's own fault if he did not set up that defence at that time. It may be added that the interests of C and K were clearly opposed in the first suit, and that C could have appealed against the decree passed therein; see also *Nawab Mahomed Amínudín Khan* v. *Mozaffer Hosein Khan*, V B. L. R., P. C., 570.[1] In the case of *Ram Tanú Acharjya* v. *Kammal Lochan Rai and another*

[1] See the passage quoted from the *Earl of Bandon* v. *Becher*, *post*, p. 288.

(III B. L. R. App. 37) a landlord sued his tenant and the tenant's surety in the Revenue Court for rent, the surety being made a nominal party merely, and the decree being passed against the tenant alone. He afterwards sued the surety in the Civil Court on the surety-bond which had been executed by him. It was decided that this second suit was not barred by the decree of the Revenue Court. It was observed that in that Court "no issue was raised as to the surety's liability, and no decree was pronounced against him." The plaintiff was, however, held not entitled to recover the *costs* of the suit in the Revenue Court. A person who purchased *a patní talúk* at a sale held under Bengal Regulation VIII of 1819, was held to be bound by a decree passed against the former *patnídar* (*Tara Persad Mittra* v. *Ram Nrising Mittra*, VI B. L. R. App. 5). As to purchasers of estates sold for arrears of Government revenue, see *ante*, p. 97.

Under English law a judgment against one or more of several *joint* wrong-doers or *joint* contractors, will, even though unexecuted, be a bar to a suit against the remaining ones. Where there are two or more *joint and several* debtors, a judgment recovered *with satisfaction* against any one or more of them will be a bar to an action against the others, but this will not be so if the judgment have not been satisfied. Whether these principles ought to be applied in the Courts in India is a question which, so far as I am aware, has not been decided. It may, however, be observed that they do not depend upon anything *technical* in the English system, and there is, therefore, no very obvious reason why they should not be applied to Indian cases.[1]

Judgment conclusive only upon the same matter.

IV. Lastly, the judgment is conclusive only upon the same matter. The second Section of the Code of Civil Procedure, using different language, speaks of suits "*brought on a cause of action*,[2] *which shall have been heard and determined*," *&c.* "There are material points of distinction," said Vice-Chancellor Knight Bruce, in a passage which has been often quoted,[3] "between the system of pleading of the English Courts of Common Law and those of other Courts of Justice. But it is, I think, to be recollected, that *the rule against re-agitating matter adjudicated is subject generally to this restriction*,

[1] See *King* v. *Hoare*, 13 Meeson and Welsby's Rep. 494; *Morgan* v. *Price*, 4 Welsby, Hurlstone, and Gordon's Rep. 619; Broom's Legal Maxims, 329—331; and Trower's Law of Debtor and Creditor, p. 95. Read, also, Sections 40 to 45 of the Indian Contract Act, IX of 1872.

[2] See the meaning of "cause of action" discussed *in DeSouza* v. *Coles*, III Mad. Rep. 384; *Harjiban Dass* v. *Bhagwan Dass*, VII B. L. R. 102; and *Babú Mohan Lal Bhaya Gyal* v. *Lachman Lal*, V B. L. R. 673.

[3] *Barrs* v. *Jackson*, 1 Younge and Collyer's Chancery Cases, 585. The Vice-Chancellor's judgment was reversed on appeal; but, as Mr. Smith remarks (II Leading Cases, 678), the principles laid down in the judgment are wholly untouched by the reversal.

that, however essential the establishment of particular facts may be to the soundness of a judicial decision, however it may proceed on them as established, and however binding and conclusive the decision may, as to its immediate and direct object, be, those facts are not all necessarily established conclusively between the parties, and that either may again litigate them for any other purpose as to which they may come in question; provided the immediate object of the decision be not attempted to be withdrawn from its operation, so as to defeat its direct object. This limitation to the rule appears to me, generally speaking, to be consistent with reason and convenience, and not opposed to authority."

Where it is doubtful whether the second suit is brought upon the same cause of action,[1] it is a useful though not an infallible test to see whether the same evidence would sustain both actions, and what was the particular point or matter determined in the former action.[2] In order to the latter, the plaint, the issues, and the judgment may all be properly considered.[3] A judgment in each species of action[4] is final only for its own purpose and object, and *quoad* the subject-matter adjudicated upon, and no further; for instance, a judgment for the plaintiff in trespass affirms a right of possession to be, as between the plaintiff and defendant, in the plaintiff at the time of the trespass committed, but, in a subsequent ejectment between the same parties, would not be conclusive with respect to the general right of property. So a judgment under Section 15, Act XIV of 1859, would show merely that the plaintiff in that suit was entitled to recover possession as having been ousted otherwise than by due course of law, but it would not be conclusive as to title in a subsequent suit between the same parties. In fact, it somewhat resembles a judgment in ejectment under English law, by which the plaintiff obtains possession of the lands but does not acquire any title thereto, except such as he previously had. If, therefore, he had previously a *zemindarí* interest in them, he is in as a *zemindar;* if he had a *ryotí* interest, he is in as a *ryot;* and if he had no title at all, he is in as a trespasser, and will be liable to account for the profits to the legal owner.

A claimed certain land as *taufir* or excess of her *talúk*. She sued B to recover it as such, and her suit was dismissed. She brought a second suit to recover possession of the same land alleging it to be an integral portion of her *talúk*, but the plea of *res judicata* was held to be good.

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[1] In *Allhusen* v. *Malgarejo*, 8 L. R. (Q. B.) 343, Blackburn, J. defined 'cause of action' as used in Section 18 of the Common Law Procedure Act, 1852, to mean "all the facts which together constitute the plaintiff's right to maintain the action." See Day's Common Law Practice, pp. 15, 20.

[2] See Broom's Legal Maxims, p. 332, and cases there cited.

[3] See V. B. L. R. 672.

[4] This refers to the different kinds of action which exist under English procedure, but which are unknown to the procedure of the Indian Mofussil.

Phear, J. said, "It is true that the title to possession on which the plaintiff now relies is different from that which she set up in the suit in 1854. In the present suit, she claims the land as being part of her *talúk*, while in 1854 she maintained that this land was *taufir*, which she had reclaimed and occupied as proprietor of the *talúk*, and on that account was entitled, as against the defendants, to have settled with her by Government. But I think the difference in the title put forward does not change the cause of action within the meaning of Section 2 of Act VIII of 1859. The plaintiff's cause of action, that which obliges her to seek the aid of a Court of Justice, is simply this, namely, that she is, as she alleges, wrongfully deprived by the defendants of the enjoyment by possession of certain land which she is entitled to have. It is for her at the trial to make out such a title to possession as will prevail against the defendants. If she omits to put forward her strongest title or her real title, so much the worse for her. The adjudication in the suit determines as between her and the defendants not only the matter of the particular title which she sets up, but the actual right to possession at the date of the plaint by whatever title it might be capable of being then supported (*Umatara Debya* v. *Krishna Kamini Dasi and others*, II B. L. R., A. C. 102, and X W. R. 426).

In connection with the latter portion of the above remarks may be read Section 7 of Act VIII of 1859, which enacts as follows:—"Every suit shall include the whole of the claim arising out of the cause of action, but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court. If a plaintiff *relinquish or omit* to sue for any portion of his claim, a suit for the portion so relinquished or omitted shall not afterwards be entertained." In the case of *Abhiram Das* v. *Sriram Das and others* (III B. L. R. 421) the plaintiff sued to recover certain property alienated by two Hindú widows, alleging that the surviving widow was unchaste and that the deed of alienation was fraudulent. He had before sued for the same property, alleging both widows to be dead and had failed. It was held that the second suit was not maintainable, Markby, J. observing, "With regard to the fraud in the *kabala*, I think that was a matter which the plaintiff was bound to include in his former suit, for it would be distinctly splitting his cause of action if he was allowed to take that ground now for the first time." It will be observed that in the two cases just quoted, that which was made the cause of action in the second suit was in existence and might have been put forward, when the first suit was brought. From these cases are distinguishable *Channú Lal Sahú* v. *Manú Lal and others*, V B. L. R. 220. Here A and B were joint owners of certain property. In the execution of one decree the interest of A was sold and purchased by C. In the execution of another decree the interests of A and B were sold and purchased by D. In a suit by A to have the sale to C set aside, A succeeded in the lower Court, but

on appeal a compromise was effected and the sale allowed to stand good. D, relying upon his purchase, sued for possession of the shares of A and B, but obtained a decree for B's share only, *the Court remarking* that so long as the sale of A's share to C remained unreversed, D could not recover this share. D upon this brought a second suit to have that sale reversed, and it was held that this suit could be maintained. Markby, J., referring to the two former cases, said, "In both these cases the plaintiff had, at the time when the suit was first brought, a complete title to recover the property he sued for, the only difference was a difference in the way that title was to be established. Here the decision or order, by which the plaintiff's suit as to A's share was dismissed, was in effect that, so long as the defendant C held the sale-certificate, no other person could get a title to that property. It is to get rid of that very sale that the plaintiff brings this suit." It does not appear very clearly from the published report, whether, when D brought his first suit, the decree of the lower Court reversing the sale in the suit between A and C was in force; or whether C was a party to D's first suit or any issue was decided in that suit as between D and C.

Whether arrears of rent for successive years are several and distinct causes of action, in respect of which separate suits may be instituted, is a point on which the decisions are conflicting. In the case of *Rájá Sato Churn Ghosal* v. *Obhai Nand Dass*, II W. R. Act X, Rul. 31, the question was decided in the affirmative: and this precedent was followed in *Ram Sander Sen* v. *Kristo Chandra Gupta and others*, XVII W. R. 380. There are, however, two authorities to the contrary, *viz.*, *Rani Bhobo Sundari* v. *Bhagwan Chandra Muzimdar*, III R. J. & P. J. Act X Rul. 14, and *Nawab Syud Ahmed Ali* v. *Mrs. E. M. Hay*, Suth. S. C. C. Ref. 63.

In the case of *Grimbly* v. *Aykroyd*,[1] decided upon the 63rd Section of the English County Court Act,[2] the facts were as follow:—A railway contractor, the defendant, had given orders to a grocer, the plaintiff, to supply with goods the workmen engaged on the works. A separate action was brought for the supplies to each workman; but it was held that the demands could not be so split, and that the supplies to all the workmen should be included in a single suit. Pollock, C.B., said that the Judges were agreed that the section applied "to the cases of tradesmen's bills, in which one item is connected with another in this sense, that the dealing is not intended to terminate with one contract, but to be continuous, so that one item, if not paid, shall be united with another and form one entire demand." It was elsewhere remarked of this case that there was one entire *prevenient* governing contract, of which the respective deliveries were merely the execution—the *overt*

[1] 1 Exchequer Rep., 479, and 17 Law Journal (N. S.), Exchequer, 157.
[2] 9 & 10 Vict., Cap. 95.

acts (see note to *Dodd* v. *Wigley*, 7 Common Bench Rep. 114; *Bonsey* v. *Wordsworth*, 25 Law Journal, N. S., C. P. 205; and *Wood* v. *Perry*, 3 Exchequer Rep. 442).

The plea of *res judicata* will apply equally whether the relinquishment of a portion of the claim in the former suit was a deliberate act or the result of accidental or involuntary omission (*Munshi Bazlúr Rahîm* v. *Shamsúnissa Begum*, before the Privy Council on the 4th July, 1867, VIII W. R. P. C. 12 (This reverses the decision of the Calcutta High Court, to be found in Marsh. Rep. 286); *Ganesh Chandra Chaudhrí and others* v. *Ram Kumar Chaudhrí*, III B. L. R. A. C., 265). Lands in respect of which there was one and the same cause of action were situated within the local jurisdictions of different Courts. A suit having been brought in respect of the lands in one jurisdiction, and a subsequent suit in respect of the lands in another jurisdiction, the latter was held not barred because the plaintiff had not obtained sanction (see *ante* p. 194) for the disposal of the whole claim by the Court in which the first suit was brought (*Takúr Persad* v. *Kalika Persad and others*, II N.-W.-P. Rep. 104). The Calcutta High Court has, however, decided directly the contrary in *Jamúna Dasí Chaudhráni* v. *Bama Sundarí Dasí Chaudhráni*, II W. R. Civ. Rul. 149, where it was observed that the effect of bringing two suits instead of one was to deprive the defendant of the right of appeal to the Privy Council, which she otherwise would have had. The widow of a deceased Mahomedan alienated different portions of her husband's property to different persons at different times and by distinct conveyances. The other heirs brought a suit against the widow and one alienee to set aside the alienation of one portion. On their bringing a second suit against the widow and another alienee to set aside the alienation of another portion, Section 7 of the Code of Civil Procedure was pleaded; but it was decided that it did not apply. Although the plaintiffs sued under the same title, *viz.*, by inheritance, in both cases, it was held that each alienation under the circumstances constituted a separate cause of action (*Mussamat Jehan Bíbí* v. *Saivak Ram and others*, I N.-W.-P. Rep. Full Bench, 109). Having reference to Section 8 of the Code of Civil Procedure (see *post*, p. 209), it may be observed that, although the widow was here a party to both suits, the cause of action in the first suit was *against the widow and one alienee*, and the cause of action in the second suit was *against the widow and another alienee*. Not being causes of action *against the same parties*, it might be contended that they could not be joined even under the permissive provisions of Section 8: and this seems to be the true ground of decision in *Sabír Khan* v. *Kalí Dass Dey and others*, I W. R. Civ. Rul. 199. Here A, B, C, and D were joint owners of a *talúk*. Default was made in payment of the rent of 1264 B.S., and the *talúk* was in consequence sold. A had not been registered as a sharer, and when he applied to the Collector

for a share of the surplus sale-proceeds, which remained after satisfying the arrear for which the sale was made, the Collector required him to establish his interest in these proceeds by a Civil suit, and he accordingly brought a suit against B, C, and D for this purpose and obtained a decree for a two-anna share of the surplus-sale proceeds. Beside the arrears of 1264 B.S., for which the *talúk* was sold, the *zemindar* held decrees for the rent of 1263 B.S., which were also satisfied out of the sale-proceeds. A alleging that the rent on his share for 1263 had been paid, and that the arrears due by B, C, and D for that year had been satisfied out of the sale-proceeds, brought a second suit to recover the amount, in proportion to his share, by which the available sale-proceeds were diminished in consequence of the payment therefrom of the rents of 1263. It was contended that he should have included this in his former claim; and, not having done so, that he was barred by Section 7. A had, however, purchased his two-anna share in 1265 at a sale in execution of a decree. It was remarked that his remedy in the second suit might be not only against B, C, and D, but also against the former proprietor of the two-anna share, and also against the zemindar. The causes of action in the two suits not being, therefore, exactly *against the same parties*, the second suit was decided to be maintainable. See and distinguish *Taríni Persad Ghose* v. *Khudamani Debí*, V B. L. R. 184, and XIII W. R. 261, in which the two suits were by the same plaintiff *against the same defendant* Similar to the case of *Mussamat Jehan Bibí* quoted above is a Bombay case, *viz.*, *Víthú and others* v. *Narain Dabhalkar* (V Bom H. C. Rep. A. C. 30). Here a Hindú, whose share in an ancestral estate had been alienated by a co-proprietor to different persons, brought three suits simultaneously against the co-proprietor and the alienees to recover three distinct parcels of land. It was decided that, although the plaintiff had only one cause of action against the co-proprietor, and therefore ought to have brought one suit against him, including all the alienees therein, or brought separate actions against the alienees and caused the proceedings in these suits to be stayed till the suit against the co-proprietor was determined, yet, inasmuch as the suits as against the co-proprietor were instituted simultaneously, the error in splitting up the claim against him did not affect the merits or the jurisdiction of the Court.

The cause of action must have been *heard and determined* in the former suit: otherwise there will be no estoppel. In *Chandra Sekhar Deb Rai* v. *Dúrgendra Deb and others* (III W. R. Civ. Rul. 39), Phear, J. said: "In order to constitute a *res judicata* with regard to a plaintiff's claim, it must have been raised by a previous suit in a Court competent to entertain it, and been *determined* by the judgment of the Court in that suit; or, if it never has been expressly raised in a previous suit, it must be such as the plaintiff might and ought to have combined with the claim which was actually made and decided in such

suit if he ever intended to avail himself of it." See also *Saikappa Chettí* v. *Raní Kulanda Rurí Nachiyar*, III Mad. H. C. Rep. 84; *Udaiya Tevar* v. *Katana Nachiyar*, II Mad. H. C. Rep. 131, and XI Moo. Ind. Ap. 50; and as to a defendant being concluded when he has omitted to put forward in his defence matter which he might and ought to have put forward, if he ever intended to rely on it, see *Mussamat Wafea* v. *Mussamat Sahiba*, VIII W. R. 307, and *Nafar Chandra Paul Chaudhrí* v. *Lakhí Maní Debya and others*, IX W. R. Civ. Rul. 300. A case *compromised* between the parties is not a case determined (*Lakshmí Ammal* v. *Tíharam Tovají*, I Mad. H. C. Rep. 240; *Jenkins* v. *Robertson*, I Law Rep. Scotch Appeals 117: but see *Allason* v. *Stark*, 9 Adolphus and Ellis' Rep. 255, and the *Earl of Hopetown* v. *Ramsay*, I Bell's Appeal, C. 69):—nor is a case summarily dismissed on a preliminary point without being tried on the merits (*Shakhí Bewah and others* v. *Mehdí Mandal and others*, IX W. R. Civ. Rul. 327; and see *Ramnath Rai Chaudhrí* v. *Bhagpat Mahapater*, III W. R, Act. X Rul. 140, where the decision in the first case had turned on a technical point). A suit brought against several ryots and dismissed on the ground that they were not jointly liable is not a bar to the same ryots being sued separately (*Babú Telakdari Sahú* v. *Bahú Bisendra Narain Sahí and another*, Hay's Rep. 528; and see *Telakdharí Sahú* v. *Bissendro Narain Sahí*, Marsh. Rep. 418). Where the plaint asked for possession and *mesne* profits, and no issue was raised and no point decided as to the right to *mesne* profits, a second suit to recover *mesne* profits was held to be maintainable (*Balum Bhutt* v. *Bhuban Lal and others*, VI W. R. Civ. Rul. 78; and see *Pratap Chandra Barua* v. *Raní Swarnamayí*, Full Bench, IV B. L. R. 113. The *laches* was here that of the Court not of the party—*Actus curiæ neminem gravabit*). A suit dismissed in consequence of neither party appearing on the day fixed for hearing (see Section 110, Act VIII of 1859) is not a bar to a fresh suit:—so where a case has been remanded by an appellate Court and then dismissed for non-appearance of both parties (*Raghanath Singh* v. *Ramkumar Mandal*, V B. L. R. App. 64):—but judgment passed against a plaintiff by default will be a bar (see Section 114, *idem*).

In connection with this part of the subject may be considered Section 97 of the Code of Civil Procedure, which is as follows:—"If the plaintiff at any time before final judgment satisfy the Court that there are sufficient grounds for permitting him to withdraw from the suit with liberty to bring a fresh suit for the same matter, it shall be competent to the Court to grant such permission on such terms as to costs or otherwise as it may deem proper. In any such fresh suit the plaintiff shall be bound by the rules for the limitation of actions in the same manner as if the first suit had not been brought. *If the plaintiff withdraw from the suit without such permission, he shall be precluded from bringing a fresh suit for the same matter.*"

On this point the following observations of their Lordships of the Privy Council are important:—"We have not been referred to any case, nor are we aware of any authority, which sanctions the exercise by the Country Courts of India of that power which Courts of Equity in this country occasionally exercise, of dismissing a suit with liberty to the plaintiff to bring a fresh suit for the same matter. Nor is what is technically known in England as a *non-suit* known in those Courts. There is a proceeding in those Court called a non-suit, which operates as a dismissal of the suit without barring the right of the party to litigate the matter in a fresh suit, but that seems to be limited to cases of misjoinder either of parties or of the matters in contest in the suit, to cases in which a material document has been rejected because it has not borne the proper stamp, and to cases in which there has been an erroneous valuation[1] of the subject of the suit. In all those cases the suit fails by reason of some point of form, but their Lordships are aware of no case in which, upon an issue joined, and the party having failed to produce the evidence which he was bound to produce in support of that issue, liberty has been given to him to bring a second suit." (*Watson* v. *The Collector of Rajsháhí*, XIII Moo. Ind. Ap. 170.) The "liberty to sue again," which gave occasion to the above observations, had been given before Act VIII of 1859 came into operation; but these observations are valuable as showing that, in the opinion of the highest Court of Appeal, there did not exist under the old system of procedure, and apart from the express provisions made by Section 97 of Act VIII of 1859, any right to withdraw from a suit once commenced, so as to retain the privilege of suing again on the same cause of action. Now it has been decided that Section 97 of Act VIII of 1859 does not apply to cases under Act X of 1859,[2] and it may, therefore, seem that such cases should be governed by the general remarks of their Lordships of the Privy Council which have been just quoted. It must, however, be observed that the Courts in India appear to regard the matter otherwise, and to assume that, where Section 97 does not apply, a plaintiff is entitled to withdraw and is not thereby prevented from suing again (*Dayal Chandra Ghose and others* v. *Dwarkanath Misser and others* (*Full Bench*) Marsh. Rep. 148; *Ram Charan Beisakh* v. *Mrs. R. Harvey*, II B. L. R., Short Notes xii). These two cases are, however, not decisive on the point. In the first of them a compromise had been made, and Peacock, C. J. said—"As there is no law which precludes plaintiffs from bringing a fresh suit when they found that they were not to have the benefit of the compromise, they are entitled to sue;"—and the second case

[1] In *Dallabh Jogi* v. *Narain Lakhú*, IV Bom. H. C. Rep. A. C. 110, it was decided that the rejection of a suit on the ground that it was improperly valued is not a bar to a fresh suit on the same cause of action.

[2] *Dayal Chandra Ghose and others* v. *Dwarkanath Misser and others*, Marsh. Rep. 148 (Full Bench).

merely decided that the plaintiff could not be compelled to go on with the case, whether he wished or not, and was entitled to withdraw his claim from the consideration of the Court when he desired so to do. Where a person claimed under an instrument as a will, and then, the will being put in issue, deliberately elected to disclaim any title under the instrument as a will, and the case went off on other grounds, it was held that he could not afterwards institute a fresh suit for the purpose of establishing the will (*Odaya Taver* v. *Katama Natchiar, Zemindar of Shiva Ganga*, XI Moo. Ind. Ap. 51). The decision in proceedings taken under Section 27 of Act X of 1859 in the Revenue Court to have the transfer of a tenure registered is not a bar to a Civil suit in the regular Courts (*Chandra Narain Ghose* v. *Kasinath Rai Chaudhri and others*, IV B. L. R., F. B., 43).

One cause of action only.

Reading together Sections 2 and 7 of the Code of Civil Procedure, Act VIII of 1859, it will be evident that where there is a single or one and the same cause of action between the same parties, the plaintiff must include the whole of the claim arising out of that cause of action in a single suit. If he fail to do so, and afterwards bring a second suit against the same parties or their privies for another portion of the claim, he will be estopped by the principle of *res judicata*. This principle is founded upon the legal maxim, "*Transit in rem judicatam*"—the cause of action has passed into matter of record, which is of a higher nature, and the inferior remedy is merged in the higher; as also upon the policy of the Law, which will not allow a man to be twice harassed in respect of the same matter—*nemo debet bis vexari pro unâ et eâdem causâ*. A *second* case is where there is *a single cause of action against several persons*. This case is partially provided for by Section 73 of the Code of Civil Procedure, which is as follows:—

"If it appears to the Court, at any hearing of a suit, that all the persons who may be entitled to or who claim some share or interest in the subject-matter of the suit, and who may be likely to be affected by the result, have not been made parties to the suit, the Court may adjourn the hearing of the suit to a future day to be fixed by the Court, and direct that such persons shall be made either plaintiffs or defendants in the suit, as the case may be. In such case the Court shall issue a notice to such persons in the manner provided in this Act for the service of a summons on a defendant."

We have already seen (*ante*, p. 200) that in certain cases a suit against one or more joint tort-feasors or co-contractors will be a bar to a second suit against the others. There is, however, no general rule of law or procedure which debars a person who has a single cause of action against several persons, and who has sued some of them in respect thereof, from bringing a second suit against others of them. It is not the defendant who is harassed here, but the plaintiff who harrasses

himself. A *third* case is where several persons have a single cause of action against one or more. The 73rd Section of the Code, above quoted, applies here also, but there is no general rule which debars a person, who has not been joined as plaintiff in the first suit, from bringing a second suit on his own account. According to Mofussil practice, a person unwilling to become a co-plaintiff is made a *pro formâ* defendant, but this does not prevent him from suing again separately. In many cases, if the provisions of Section 73 were properly applied, it ought to have this effect. There is a *fourth case* which is thus provided for by Section 8 of the Code of Civil Procedure:—

More causes of action than one.

"Causes of action by and against the same parties, and cognizable by the same Court, may be joined in the same suit, provided the entire claim in respect of the amount or value of the property in suit do not exceed the jurisdiction of such Court."

It will be observed that the words of the law are permissive—"*may* be joined," &c. The omission to join will not, therefore, be a bar to a subsequent suit brought on a cause of action, which, though it might under the above Section have been joined with another cause of action in a previous suit, is yet a separate and distinct cause of action from that previously sued upon. Causes of action, in order to be joinable in the same suit, must be "*by and against the same parties, and cognizable by the same Court.*" If one cause of action is against one person and another cause against another person, they cannot be joined (*Munshí Manírudín Ahmed* v. *Babú Ram Chand and others*, II B. L. R. 341; *Raní Sarat Sundarí Debya and another* v. *Surja Kant Acharjya Chaudhrí and others*, II B. L. R. App. 53; and see *ante*, p. 204). In the following cases the subject-matter of both suits was clearly not the same, and the principle of *res judicata* was held not to apply to the second suit:—In a former suit by the plaintiff against the defendant for rent, the latter denied the tenancy and the plaintiff's title to the land. The plaintiff thereupon sued him as a trespasser in the Civil Court for possession and *mesne* profits. The failure of the suit for rent was held to be no bar to the recovery of *mesne* profits (*Dataram* v. *Ram Krishto and others*, IX W. R. 594; *Kadír Baksh and another* v. *Golam Ali Gomushta*, IX W. R. 90). A suit to recover enhanced rent after service of notice was held to be no bar to a second suit brought after the failure of the first to recover arrears of rent for the same year at the former rate (*Khedarunissa Bíbí and others* v. *Búdhí Bíbí and others*, XIII W. R. 317). A and B were two brothers, Hindús. On their death C, claiming to be the adopted son of A, brought a suit for succession to the estate of both. D, the widow of B, pleaded that A and B had separated in their lifetime, and that C was not the adopted son of A. The question of adoption was decided against C (but only in

Subject-matter of each suit wholly different.

respect of A's estate, as was afterwads contended in appeal). He was, however, held entitled to A's estate under a deed of grant. C afterwards brought a second suit to obtain B's estate on the ground that D had forfeited her right to the same by reason of her unchastity and consequent excommunication, and in this suit he again alleged that he was the adopted son of A. The lower Court held that he was barred from setting up this title, as in a former suit against the same defendants it was decided that he was not the adopted son of A. On appeal to the High Court, however, it was held that the previous decision did not afford a legal bar to C's proving the alleged adoption, if he could, by legal evidence in the second suit, which was brought *to obtain a different*[1] *property upon a different cause of action* (*Kriparam* v. *Bhagawan Das*, I B. L. R., A. C. 69). A Hindú sued to establish his right to a half share in certain ancestral property, and in the schedule attached to his plaint he stated that he was in possession of certain lands, a portion of the whole property. A decree was passed in his favour, which was appealed to the Privy Council. While this appeal was pending, he brought a second suit to recover possession of the lands, possession of which he had admitted in the schedule to his first plaint. He alleged that he had been forcibly dispossessed from these lands during the pendency of the first suit. The cause of action in each case was clearly different, and it was held that the principle of *res judicata* had no application (*Babú Gúrú Das Rai* v. *Babú Haronath Rai and others*, VII W. R. Civ. Rul. 423). A suit to raise an attachment on a house which failed was held not to be a bar to a second suit against the purchaser in execution to recover possession of the same house (*Moro Balkrishno Mule* v. *Sheik Saheb Badírudin Kamble*, V Bom. H. C. Rep. A. C. 199). In the case of *Babú Mohan Lal Bhaya Gyal and another* v. *Lachman Lal* (V B. L R. 663), the facts were as follow:—A Hindú died leaving a sister, A, and a deceased sister's son, B. Upon A taking possession of the property, B brought an action against her, claiming to be the preferable heir. This action failed. A having died, and having left an adopted son, C, B now brought a second suit to obtain the property, alleging that C was not the adopted son of A, and that he (B), who came within the class of *bandhús*, was entitled to succeed to the property as there was no nearer heir alive. The plea of *res judicata* was held to have no application. "The cause of action in the second case," it was remarked, "was the retention of certain property, of which the defendant, by averment of his right of inheritance by adoption, prevented the plaintiff, as sister's son, from obtaining possession; and it was clearly stated in the plaint that this, the plaintiff's cause of action, arose on the death of

[1] The words in italics, taken from the judgment of Phear, J. seem to show that the question of adoption was not decided in the first case in respect of B's estate. The argument shows that it was so contended in the appeal.

A. In the former suit the present plaintiff sued A, alleging that she, as a childless Hindú widow, had no right to hold the property under the Hindú law." A decree declaring plaintiff's right to assess rent upon land formerly claimed as *lahheraj* is a binding decision between the parties on the question of title, even although it has not been executed within the period allowed by the law of limitation (*Ram Sundarí Debya Chaudhrain* v. *Ram Persad Sadhú and others*, VIII W. R. Civ. Rul. 288). A contracted with B to supply straw for twelve months, the supplies to be sent daily. A failed to supply the straw. On the 12th March B sued him for damages for the default committed up to that date. The contract was denied, but was held to have been proved. A subsequent suit was brought to recover damages for default to deliver between the 17th April and the 16th June. It was held that the second suit was not barred, the contract being a continuing one; but that the *factum* of the contract was *res judicata* (*Cook and others* v. *Jadab Chandra Nandí*, II B. L. R. O. J. 48; and see *W. Smith* v. *Gopal Chandra Chakravartti*, Suth. S. C. C. Ref. 80).

Foreign Judgments.

It remains to say a few words about the effect of foreign judgments, *i. e.*, judgments of the Courts of other countries. In the case of *Balaram Gooy and others* v. *Kamíní Dasí*, IV W. R. Civ. Rul. 108, the plaintiff sued on a judgment pronounced by the French Court at Chandernagore; and it was held that, if there was no reason to question this foreign judgment *upon the ground of fraud* or want of jurisdiction, or that it was unduly obtained, the Court should accept it as conclusive between the parties, and should not inquire into the merits of the case or the propriety of the decision (see also *Madhú Bíbí* v. *Ram Manickya Dey*, VI W. R. Civ. Ref. 31; and *Mahomed Ahmed* v. *Akbar Ghazí*, X W. R. 337). The effect to be given to foreign judgments will be found discussed in Mr. Smith's Note to the Duchess of Kingston's Case, II Leading Cases, pp. 683—688. The result of the authorities seems to be that a foreign judgment will not be conclusive if it appear on the face of the proceedings that it is founded on an incorrect view of the English law, knowingly or perversely acted on—or of the law of nations—or if it offend common reason and justice—or if it be grossly defective—or if it be shown by extrinsic evidence that the Court which pronounced it had no jurisdiction—or that it was obtained by fraud—or by means clearly contrary to natural justice, as, for instance, without any notice, summons, or equivalent proceeding. As to whether a foreign judgment can be impeached on the merits, there has been very considerable doubt and conflict of opinion, which have been probably a good deal increased by arguments in which it was assumed that no distinction existed between the claim to question a foreign judgment on the merits and to question it upon the ground of fraud or want of jurisdiction, or that it was unduly obtained. There is no doubt that a foreign judgment

cannot be conclusive, unless it be shown to be so in the country where it was pronounced; but it appears to be now settled that where an action is brought on the judgment of a foreign or colonial Court having jurisdiction over the parties and the subject-matter of the suit, it cannot be impeached on the ground that it is erroneous on the merits (see also Westlake's Private International Law, pp. 361—378). It may be observed that when the foreign judgment is that of a Civil Court established by the authority of the Governor-General of India in Council in the territories of any foreign Prince or State, it is not necessary to bring a fresh suit thereon, as it can be executed under the provisions of Section 284 and following Sections of Act VIII of 1859.

Section 2, Act VIII of 1859, applies to Courts of Small Causes in the Mofussil (see Section 47, Act XI of 1865). It may be declared applicable to Courts of Small Causes in the Presidency Towns (see Section 15, Act XXIV of 1864). It has not, however, been yet so declared applicable. A question has been raised in these latter Courts as to whether the principal of *res judicata* can now any longer be applied by them, seeing that Section 2 of the Indian Evidence Act has repealed all rules of evidence not contained in any Statute, Act, or Regulation in any part of British India. A similar question may be raised as to Revenue Courts sitting under the provisions of Act X of 1859, this Act containing no provisions analogous to those of Section 2, Act VIII of 1859, and this Section not being applicable to such Courts. In the case of the Courts of Small Causes in the Presidency Towns, the difficulty can be easily got over by extending Section 2 of Act VIII of 1859 to them under the provisions of Section 15, Act XXIV of 1864. In the case of the Revenue Courts[1] legislation would appear to be necessary—that is, if the difficulty really exist. It may, however, be a good answer to the objection to say that the rule in question is not a rule of evidence, and therefore has not been repealed by Section 2 of the Evidence Act; but a rule of procedure, which is therefore untouched by the repealing provisions just mentioned (see *ante* page 5). That it was so regarded by the authors of the Indian Evidence Act, there can be no doubt. It may be observed that the words "by law" were substituted for "under any provision of the Codes of Civil or Criminal Procedure," which were used in the first draft of the Section, and which might have been interpreted to restrict the application of these provisions to the Courts in which these Codes have operation.

The application of the rule—*Nemo debet bis vexari, si constat curiæ quod sit pro uná et eádem causá*[2]—*Nemo debet bis puniri pro uno*

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[1] In the case of rent suits tried by the Civil Courts under Act VIII (B. C.) of 1869, Section 2 of Act VIII of 1859 does apply (See Section 34 of the former Act).

[2] "No one ought to be twice harassed, if it be clear to the Court that it is for one and the same cause."

delicto[1]—to criminal cases is thus provided for by Section 460 of the Code of Criminal Procedure:—

"A person who has once been tried for an offence and convicted or acquitted of such offence, shall, *while such conviction or acquittal remains in force*, not be liable to be tried again *on the same facts* for the same offence, nor for any other offence, for which a different charge from the one made against him might have been made under section *four hundred and fifty-five*,[2] or for which he might have been convicted under Section *four hundred and fifty-six*.[3]

Person once convicted or acquited not to be tried for same offence.

A person convicted or acquitted of any offence, may be afterwards tried for any offence, for which a separate charge might have been made against him on the former trial under section *four hundred and fifty-four*,[4] paragraph I.

A person acquitted or convicted of any offence in respect of any *act causing consequences which, together with such act, constituted a different offence* from that for which such person was acquitted or convicted, may be afterwards tried for such last-mentioned offence, if the consequences had not happened, or were not known to the Court to have happened, at the time when he was acquitted or convicted.

A person acquitted or convicted of any offence in respect of any facts may, notwithstanding such acquittal or conviction, be subsequently charged with and tried for any other offence which he may have committed in respect of the same facts, if the Court by which he was first tried was *not competent to try the offence* with which he is subsequently charged.

Illustrations

(*a.*) A is tried upon a charge of *theft as a servant* and acquitted. He cannot afterwards be charged upon the same facts either with theft as a servant, with theft simply, or with *criminal breach of trust.*

(*b.*) A is tried upon a charge of *murder* and acquitted. There is no charge of *robbery;* but it appears from the facts that A committed *robbery* at the time when the murder was committed; he may afterwards be charged with and tried for robbery.

(*c.*) A is tried for an *assault* and convicted. The person afterwards dies. A may be tried again for *culpable homicide.*

(*d.*) A is tried under Section 270 of the Indian Penal Code, for *malignantly doing an act likely to spread the infection of a disease dangerous to life* and is acquitted. The act so done afterwards causes a

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[1] "No one ought to be twice punished for one offence.

[2] See *post*, page 216.

[3] See *post*, page 217.

[4] See *post*, page 214.

person permanently to lose his eyesight. A may be charged under Section 325 with voluntarily causing *grievous hurt* to that person.

(*e.*) A is charged before the Court of Session and convicted of the *culpable homicide* of B. A may not afterwards be tried for the *murder* of B on the same facts.

(*f.*) A is charged by a Magistrate of the first class with, and convicted by him of, *voluntarily causing hurt* to B. A may not afterwards be tried for voluntarily causing *grievous hurt* to B on the same facts, unless the case comes within paragraph three.

(*g.*) A is charged by a Magistrate of the second class with, and convicted by him of, *theft* of property from the person of B. A may be subsequently charged with and tried for *robbery* on the same facts.

(*h.*) A, B, and C are charged by a Magistrate of the first class with, and convicted by him of, *robbing* D. A, B, and C may afterwards be charged with and tried for *dacoity* on the same facts.

Sections 454, 455, and 456, above referred to, are as follow:—

I.—Trial of more than one offence.

454. I.—"If in *one set of facts* so connected together as to form the *same transaction*, more offences than one are committed by the same person, he may be charged with and tried for every such offence at the same time.

II.—One offence falling within two definitions.

II.—If a *single act* falls within *two separate definitions of any law*, in force for the time being, by which offences are defined or punished, the person who does it may be charged with each of the offences so committed, but he must not receive a more severe punishment than could be awarded, by the Court which tries him, for either.

III.—Acts severally constituting more than one offence, but collectively coming within one definition.

III.—If *several facts*, of which one or more than one would by itself constitute an offence, form, when combined, an offence under the provisions of any law, in force for the time being, by which offences are defined or punished, a person who does them may be charged with every offence which he may have committed, but he must not receive for such offences, collectively, a punishment more severe than that which might have been awarded, by the Court trying him, for any one of such offences, or for the offence formed by their combination.[1]

Illustrations.

To paragraph I.

(*a.*) A *rescues* B, a person in lawful custody, and causes *grievous hurt* to C, a constable, in whose custody B was. A may be separately charged with, convicted of, and punished for offences under Sections 225 and 333, Indian Penal Code.

[1] See also Sections 71 and 72 of the Indian Penal Code.

(*b.*) A has in his possession *several counterfeit seals* with the intention of committing several forgeries. A may be separately charged with, convicted of, and punished for the possession of each seal for a distinct forgery, under Section 473, Indian Penal Code.

(*c.*) A, with intent to cause injury to B, *institutes proceedings* against him knowing there is no just or lawful ground for such proceedings. A also *falsely charges* B with having committed an offence. A may be separately charged with, convicted of, and punished for two offences under Section 211, Indian Penal Code.

(*d.*) A, with intent to injure B, brings a *false charge* against him of having committed an offence. On the trial, A *gives false evidence* against B. A may be separately charged with, convicted of, and punished for offences under Sections 211 and 194, or 195, Indian Penal Code.

(*e.*) A, knowing that B, a female minor, has been kidnapped, *wrongfully confines her* and *detains her as a slave.* A may be separately charged with, convicted of, and punished for offences under Sections 368 (read with 367) and 370, Indian Penal Code.

(*f.*) A, with six others, commits the offences of *rioting, grievous hurt,* and of *assaulting a public servant* engaged in suppressing the riot. A may be separately charged with, convicted of, and punished for offences under Sections 147, 325, and 152, Indian Penal Code.

(*g.*) A *criminally intimidates* B, C, and D at the same time. A may be separately charged with, convicted of, and punished for each of the three offences under Section 506, Indian Penal Code.

(*h.*) A intentionally causes the *death of three persons* by upsetting a boat. A may be separately charged with, convicted of, and punished for three offences under Section 302, Indian Penal Code.

To paragraph II.

(*i.*) A commits *mischief* by cutting down a tree in a Government forest. The tree overhangs the bank of a river and falls into the stream. A commits *theft* by having severed the tree and by floating it down the river to his village, where he sells it. A may be separately charged with and convicted of offences under Sections 426 and 379, Indian Penal Code; but the Court which tries him may not inflict a more severe sentence than if it had convicted him under Section 379 only.

(*j*). A *wrongfully strikes* B with a cane. A may be separately charged with and convicted of offences under Sections 352 and 323 of the Indian Penal Code; but the Court which tries him may not inflict a more severe sentence than if it had convicted him under Section 323 only.[1]

(*k*). A wrongfully *kills* a buffalo worth sixty rupees, belonging to B, and then *takes away* the carcass in a manner amounting to theft.

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[1] *Kaptan* v. *G. M. Smith*, VII B. L. R. Ap. 25.

A may be separately charged with and convicted of offences under Sections 429 and 379, Indian Penal Code; but the Court which tries him may not inflict a more severe sentence than if it had convicted him under Section 429 only.

(*l.*) Several stolen sacks of corn are made over to A and B, who know they are *stolen property*. A and B thereupon assist each other to conceal the sacks at the bottom of a grain-pit. A and B may be separately charged with and convicted of offences under Sections 411 and 414, Indian Penal Code; but the Court which tries them may not inflict a severer sentence than if it had convicted them under one of those Sections only.

(*m.*) A *uses a forged document* in evidence in order to convict B, a public servant, of an offence under Section 167. A may be separately charged with and convicted of offences under Sections 471 (read with 466) and 196 of the Indian Penal Code; but the Court which tries him may not inflict a severer sentence than if it had convicted him under one of those Sections only.

To paragraph III.

(*n.*) A commits *house-breaking* by day with intent to commit adultery, and commits, in the house so entered, *adultery* with B's wife. A may be separately charged with and convicted of offences under Sections 454 and 497, Indian Penal Code; but the Court which tries him may not inflict a severer sentence than if it had convicted him under Section 497 only.

(*o.*) A *robs* B, and, in doing so, *voluntarily causes hurt* to him. A may be separately charged with and convicted of offences under Sections 323, 392, and 394 of the Indian Penal Code; but the Court which tries him may not inflict a severer sentence than if it had convicted him under Section 392 or 394 only.

(*p.*) A *entices* B, the wife of C, away, and then commits *adultery* with her. A may be separately charged with and convicted of offences under Sections 498 and 497, Indian Penal Code; but the Court which tries him may not inflict a severer sentence than if it had convicted him under Section 497 only.

Where it is doubtful what offence has been committed.

455. If a single act or set of acts is of such a nature that it is doubtful which of several offences the facts which can be proved will constitute, the accused person may be charged with having committed any such offence; and any number of such charges may be tried at once, or he may be charged in the alternative with having committed some one of the said offences.

Illustration.

A is accused of an act which may amount to either theft, receiving stolen property, criminal breach of trust, or cheating. He may be charged separately with theft, criminal breach of trust, or cheating,

or he may be charged with having committed either theft or criminal breach of trust or cheating.

When a person charged with one offence can be convicted of another.

456. If in the case mentioned in the last Section, one charge only is brought against an accused person, and it appears in evidence that he committed a different offence, for which he might have been charged under the provisions of that Section, he may be convicted of the offence which he is shown to have committed, although he was not charged with it.

Illustration.

A is charged with theft. It appears that he committed criminal breach of trust or receiving stolen goods. He may be convicted of criminal breach of trust or receiving stolen goods, though he was not charged with it."

In connection with the above Sections the following cases may be usefully referred to, *viz*: *The Queen* v. *Dwarkanath Dutt*, II Jur. N. S. 73, and VII W. R. Crim. Rul. 15; *The Queen* v. *Tikú Gwala*, VIII W. R. Crim. Rul. 61; *Jagabandhu Mytí* v. *Goberdhan Bera*, IV B. L. R. Crim. Rul. 1: and see Explanation II, Section 195; Explanation II, Section 215; and Section 212 of the Code of Criminal Procedure, Act X of 1872; and in the matter of the petition of *Ramjai Mazímdár*, VI B. L. R. Ap. 67. The confinement of a man on political grounds under a warrant issued under the provisions of Bengal Regulation III of 1818 is not a bar to a prosecution under the regular Criminal Law for offences charged to have been committed before such confinement (*The Queen* v. *Amir Khan and others*, IX B. L. R. 36).

As to the mode of proving a previous conviction or acquittal, Section 326 of the Code of Criminal Procedure enacts as follows:—

Previous conviction or acquittal how proved.

"Where a previous conviction or acquittal is to be proved against an accused person, application shall be made to the officer in whose custody the records of such trial may be. It shall not be necessary to produce the record of the conviction or acquittal of such accused person, or a copy thereof, but an extract may be produced in proof of such conviction or acquittal if *certified*, under the hand of the Clerk of the Court or other officer having the custody of the records of the Court in which such conviction or acquittal was had, or by the Deputy of such Clerk or officer, to be a copy of the charge, finding, and sentence, as the case may be."]

Judgments in probate, &c., jurisdiction.

41. A final judgment, order or decree, of a competent Court, in the exercise of Probate, Matrimonial, Admiralty or Insolvency jurisdiction,

which confers upon or takes away from any person any legal character, or which declares any person to be entitled to any such character, or to be entitled to any specific thing, not as against any specified person but absolutely, is relevant when the existence of any such legal character, or the title of any such person to any such thing, is relevant.

Such judgment, order or decree is conclusive proof

that any legal character which it confers accrued at the time when such judgment, order or decree came into operation;

that any legal character, to which it declares any such person to be entitled, accrued to that person at the time when such judgment [order or decree[1]] declares it to have accrued to that person;

that any legal character which it takes away from any such person ceased at the time from which such judgment [order or decree[1]] declared that it had ceased or should cease;

and that any thing to which it declares any person to be so entitled was the property of that person at the time from which such judgment [order or decree[1]] declares that it had been or should be his property.

[With reference to this Section, the Select Committee on the Bill remarked in their report as follows:—"For the sake of simplicity, and in order to avoid the difficulty of defining or enumerating judgments *in rem*, we have adopted the statement of the law by Sir Barnes Peacock in *Kanhya Lal* v. *Radhachurn*, VII W. R. Civ. Rul. 339.[2] The following is the judgment delivered in this case by the very learned Chief Justice, and concurred in by the other Judges of the Full Bench:—

Kanhya Lal and others v. *Radhachurn and others.*

"This suit was brought by Kanhya Lal, as heir of Ramnarain Singh, for a declaration of his right of heirship, and for possession of certain

[1] The words in brackets were added by the amending Act, XVIII of 1872.

[2] See also II Jur N. S. 229; and III R. C. & C. R. Civ. Rul. 240.

lands with *mesne* profits. The other plaintiffs claimed a portion of the estate by purchase from Kanhya Lal.

The plaintiff alleged that Ramnarain obtained the property from Júmak Lal, his maternal grandfather, by deed of gift; that Ramnarain died without issue, leaving Mussamat Deo Kúnwar his widow; and that upon her death the property *descended to the plaintiff as the nephew and heir of Ramnarain*, the plaintiff being the son of Ramnarain's natural brother, and grandson of his natural father.

The principal defendant, Radhachurn, denied the plaintiff's right as heir of Ramnarain. He alleged that *Ramnarain was adopted by Júmak Lal; and that on the death of Ramnarain without issue* the right accrued to defendant Radhachurn as an agnate of Júmak Lal, and did not descend to plaintiff as the son of Ramnarain's natural brother.

The other defendants claimed by purchase from Radhachurn.

The plaintiffs denied that Ramnarain was adopted by Júmak Lal. The defendants, in support of their allegation of the adoption, relied upon a decree obtained by defendant Radhachurn in a suit brought by him against Mussamat Deo Kúnwar, the widow of Ramnarain, to set aside certain alienations made by her, and to have his title as reversionary heir established. The suit was defended by Mussamat Deo Kúnwar on the ground that her husband *had not been adopted, and that he took the property by deed of gift from Júmak Lal*, and consequently that Radhachurn was not heir in reversion. The present plaintiff presented a petition in that suit, asserting his right on the same ground as that on which he now sues, but the Court held that no order was requisite on his petition, and *he was not made a party to the suit.* The Court in that case found that Ramnarain was adopted by Júmak Lal, and that the then plaintiff and now defendant, Radhachurn, was the reversionary heir. The judgment was affirmed in appeal in 1853.

It was contended on the part of the defendants in this case that that judgment was a judgment in rem *as to the adoption.* On the trial of the case, the Judge, upon the authority of a case reported in the *Weekly Reporter*, Vol. III, page 14, Civil Rulings, in which Rajkristo was appellant, held that the judgment was a judgment *in rem quoad* the adoption, and that it was final and conclusive against the present plaintiff upon that point. The first Bench, before whom this appeal came, felt themselves bound in consequence of the decision above-mentioned, to refer to a Full Bench the following question, *viz., whether the judgment was admissible as evidence against the plaintiff; and, if so, whether it was conclusive, or merely primâ facie evidence against him?*

The case has been fully argued before us, and we are of opinion that *the judgment was not a judgment* in rem, *and that it was not admissible in evidence against the plaintiff.*

The petition of the plaintiff in the suit brought by Radhachurn having been rejected, the plaintiff was no party to that suit.

The general rule was clearly laid down by Chief Justice DeGrey in the Duchess of Kingston's case. In answer to* certain questions put to the Judges by the House of Lords, he said:—'It is certainly true as a general principle that a transaction between two parties in judicial proceedings ought not to be binding upon a third; for it would be unjust to bind any person who could not be admitted to make a defence, or to examine' (and he might have added to cross-examine) 'witnesses or to appeal from a judgment which he might think erroneous; and therefore the deposition of witnesses in another case in proof of a fact, the verdict of a jury' (or, in this country, of a Court) 'finding the facts, and the judgment of the Court upon the facts found, *although evidence against the parties, and all claiming under them, are not in general to be used to the prejudice of strangers.* There are some exceptions to this general rule, founded upon particular reasons, but not being applicable to the present subject, it is unnecessary to state them. *From a variety of cases relative to judgments being given in evidence in civil suits, these two deductions seem to follow as generally true;* FIRST, that the judgment of a Court of *concurrent* jurisdiction directly upon the point, is as a plea, a bar, or as evidence, conclusive *between the same parties upon the same matter directly in question* in another Court' (or he might have added in another action between the same parties in the same Court); SECONDLY, that the judgment of a Court of *exclusive* jurisdiction directly upon the point, is, in like manner, conclusive upon the same matter between the same parties, coming incidentally in question in another Court for a different purpose. But *neither the judgment of a concurrent or exclusive jurisdiction is evidence of any matter which came collaterally in question, though within their jurisdiction, nor of any matter incidentally cognizable, nor of any matter to be inferred by argument from the judgment.*'

See 2 Smith's Leading Cases, page 424.

The principle that a judgment is not to be used to the prejudice of strangers was adopted from the civil law, of which the following were maxims that "*Res inter alios judicata nullum inter alios prejudicium facit;*[1] or "*Res inter alios acta alteri nocere non debet.*[2] The principle was not applicable to judgments in actions *in rem.* The *exception* of judgments *in rem* in the civil law was no doubt the foundation of the exception in the English law.

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[1] "A matter adjudicated upon between one set of parties in nowise prejudices another set of parties."

[2] "A matter transacted between other persons cannot injure a different person."

The question as to what is a judgment *in rem* was fully considered by Mr. Holloway in Madras Regular Appeal[1] No. 48 of 1864, 2 Stokes and O'Sullivan's Reports, 176. Although I cannot concur in the whole of Mr. Holloway's reasoning, I consider that the full investigation which the subject received at his hands, in that case, has been of great benefit in removing many erroneous impressions which previously existed. I concur with him entirely in the conclusion at which he arrived, *viz.*, that a decision by a competent Court that a Hindú family was joint and undivided, or upon a question of legitimacy, adoption, partibility of property, rule of descent in a particular family, or upon any other question of the same nature in a suit *inter partes*, or, more correctly speaking, in an action in *personam*, is not a judgment *in rem*, or binding upon strangers, or in other words upon persons who were neither parties to the suit nor privies. I would go further, and say that a decree in such a case is not and ought not to be admissible at all as evidence against strangers.[2]

I do not think that Mr. Smith's definition of a judgment *in rem* is accurate. But Mr. Holloway has not, I think, attached sufficient importance to the words used by Mr. Smith—'which very declaration operates upon the *status* of the thing adjudicated upon, and *ipso facto* renders it such as it is thereby declared to be.' This would not be the effect of a finding upon a question of *status* in a suit *in personam*, though it might have been so under the civil law in a suit *in rem*, not for the purpose of asserting a right against a particular person, but for the purpose of adjudicating upon the *status*.

I do not agree with Mr. Holloway in his remark at p. 281 of his judgment—'that the effect of a decree of every competent Court is to render the person or thing that which it declares him, or it, to be.' A decree, according to the nature of it, may prevent particular persons or the subjects of a particular Government, or it may be the whole world, from averring to the contrary. According to the civil law a suit, in which a claim of ownership was made against all other persons, was an action *in rem*, and the judgment pronounced in such action was a judgment *in rem*, and binding upon all persons whom the Court was competent to bind; but if the claim was against a particular person or persons, it was an action *in personam* and the decree was a decree *in personam*, and binding only upon the particular person or persons against whom the claim was preferred, or persons who were privies to them.

This will be made more clear by referring to the note of Mr. Sandars upon Section 1, Book 4, Tit. 6, of the Institutes of

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[1] *Yara Kalamma* v. *Annakala Naramma.*

[2] But see now Section 13, *ante*, pp. 86—87, and Sections 42 and 43, *post.*

Justinian, a Section which is quoted by Mr. Justice Holloway in his judgment above referred to. He says:—'*The first and most important division of actions is that into actions* in rem *and actions* in personam: *by the first of which we assert a right over a thing against all the world: by the second we assert a right against a particular person* (see Introduction, Section 61), and accordingly, speaking technically, an action was called *real*, when the formula in which it was conceived embodied a claim to a thing without saying from whom it was claimed; and *personal*, when the formula stated upon whom a claim was made. If Titius said that a piece of land belonged to him, there was no necessity that the name of the wrongful occupier should appear in the formula, at any rate not in the *intentio*,[1] the part of the formula always considered characteristic of the *actio*. *Si paret Titii esse rem*—This was all; the question to be decided was—does the thing belong to Titius? It was only as a consequence of Titius's proprietorship being established that the wrongful occupier, whose name might appear in the *condemnatio*, was condemned to lose the possession. But, in an action arising on a contract, the name of a person was necessarily introduced into the *intentio*. *Titius* could not merely say that a thing was owed to him, he must add that it was owed by a particular person. There are, indeed, some cases, as for instance, a deposit, in which the action may be equally well-shaped with or without the insertion of the name of a particular person. There may either be a real action in which the plaintiff claims the thing, or a personal one, in which he says that the depositary ought to give it him. Whenever the action is made to rest on an obligation, it is personal; when on a right of proprietorship, it is real.'

The case is made still more clear in para. 61 of the Introduction. There Mr. Sandars says:—'His special interests prompt each man to claim, as against his fellows, an exclusive interest in particular things. Sometimes such a claim sanctioned by law is urged directly; the owner, as he is said to be, of the thing, publishes this claim against all other men, and asserts an indisputable title himself to enjoy all the advantages which the possession of the thing confer. Sometimes the claim is more indirect; the claimant insists that there are one or more particular

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[1] "The formula usully consisted of three distinct parts called *demonstratio*, *intentio*, and *condemnatio*.

The *demonstratio* stated shortly what had given rise to the litigation.

The *intentio* set forth the plaintiff's claim, and the question which the *judex* was called upon to decide.

The *condemnatio* gave the judge power to condemn or acquit the defendant, according to the result of his examination of the affair."—*Lord Makenzie's Studies in Roman Law* p. 303.

individual or individuals, who ought to put him in possession of something he wishes to obtain, or do something for him, or fulfil some promise, or repair some damage they have made or caused. Such a claim is primarily urged against particular persons, and not against the world at large. On this distinction between claims to things advanced against all men, and those advanced primarily against particular men, is based the division of rights into real and personal, expressed by writers of the middle ages on the analogy of terms found in the writings of the Roman jurists, by the phrase *jura in re* and *jura ad rem.* A real right, a *jus in re*, or, to use the equivalent phrase preferred by some later commentators, *jus in rem*, is a right to have a thing to the exclusion of all other men. A personal right, *jus ad rem*, or to use a much more correct expression, *jus in personam*, is a right in which there is a person who is the subject of the right, as well as a thing as its object—a right which gives its possessor a power to oblige another person to give or procure, or do or not do, something. It is true that in a real right the notion of persons is involved, for no one could claim a thing if there were no other persons against whom to claim it; and that in a personal right is involved the notion of a thing, for the object of the right is a thing which the possessor wishes to have given, procured, done, or not done.'

Besides actions *in rem* which related to property, there were certain actions called *actiones prejudiciales.* Of these it is said in the Institutes, Book 4, Tit. 6, S. 13, that they seem to be actions *in rem*, such as 'those by which it is inquired whether a man was born free or had been made free; whether he was a slave, or whether he was the offspring of his reputed father.' These actions no doubt were the origin of the rule laid down as to judgments on actions, in which questions relating to *status* were determined.

Mr. Sandars, in his note to that Section, says:—'The object of a *prejudicialis actio* was to ascertain a fact, the establishing of which was a necessary preliminary to further judicial proceedings.[1] Such actions differ from actions *in rem*, because in an *actio prejudicialis* no one is condemned, only the fact is ascertained, but they are said in the text to resemble actions *in rem*, because they were not brought on any obligation, and because in the *intentio*, which indeed composed the whole formula in this case, no mention was made of any particular person. Questions of *status*, such as those of paternity, filiation, and the like,

[1] The *actio* is the legal remedy by which a private person, called the *actor* or plaintiff, enforces a private lawful claim.....According to their object actions are divisible into 1.....2. Those which proceed for the preliminary recognition of a certain relation (*actiones prejudiciales*).—*Modern Roman Law*, by Tomkins and Jencken, p. 85.

were most commonly the subject of *actiones prejudiciales*, but were by no means the only ones. We hear of others.

In Austin on Jurisprudence, Vol. III, page 165, it is said :—'In case a child is detained from his father, the latter can recover him from the stranger by a proceeding in a Court of Justice, which, let it be named as it may, is substantially an action *in rem*. In case a slave be detained from his master's service, the master can recover him in *specie* from the stranger who wrongfully detains him.' It is a mistake, I think, to call such actions actions *in rem*, they are strictly actions *in personam*. An action by a person alleged to be a slave claiming to have it declared as against all men that he was a freeman was an *actio prejudicialis* in which the judgment would have contained a declaration upon the *status*.

Great misunderstanding and error have been caused, as is shown by Mr. Holloway, from the use of the words '*status*,' and "judgments *in rem*" in some of our English text-books without any precise definition, and indeed in some cases without any accurate conception of their meaning. For instance, I have seen it stated that 'judgments declaring personal *status* or conditions, as judgments of adultery, are conclusive upon all the world.' What a judgment of adultery is, or how adultery can be said to declare a personal *status* or condition, it is difficult to conceive. Possibly it means a judgment of divorce on account of adultery; but, if so, it is not a judgment *in rem*, or conclusive upon all the world of the fact of adultery.

It is unnecessary to consider more minutely the civil law upon the subject of judgments *in rem* or of *actiones prejudiciales*. It is sufficient to say that they were not actions *in personam*, and that the claims in them were advanced generally against every one, and not against particular individuals.

From what has been said, it will be readily seen that there are no suits in this country, with the exception of those in the High Court in the exercise of Admiralty and Vice-admiralty jurisdiction, which answer to the actions *in rem* of the civil law, and none corresponding with the *actiones prejudiciales*. We have little to do with foreign judgments. Suits in the Exchequer for the condemnation of goods are not applicable to this country, and it is, therefore, unnecessary to refer to them. We have not as yet any suits here for divorce *a vinculo matrimonii* so far as Christians are concerned, so that no question can arise as to the effect of judgments in such suits.[1]

Decrees by Courts of competent jurisdiction for the absolute dissolution of marriages are no doubt binding upon third parties. If a Court of

[1] This judgment was pronounced in 1867, *i. e.* two years before the passing of "The Indian Divorce Act," IV of 1869.

competent jurisdiction decrees a divorce or sets aside a marriage between Mahomedans or Hindús, it puts an end to the relationship of husband and wife, and is binding upon all persons that, from the date of the decree, the parties ceased to be husband and wife. This, in my opinion, is not upon the principle that every one is presumed to have had notice of the suit, as Mr. Holloway appears to think, for if they had notice they could not intervene or interfere in the suit; but upon the principle that when a marriage is set aside by a Court of competent jurisdiction, it ceases to exist, not only so far as the parties are concerned, but as to all persons; a valid marriage causes the relationship of husband and wife not only as between the parties to it, but also as respects all the world; a valid dissolution of a marriage, whether it be by the act of the husband, as in the case of repudiation by a Mahomedan, or by the act of a Court competent to dissolve it, causes that relationship to cease as regards all the world.

The record of a decree in a suit for divorce or of any other decree is evidence that such a decree was pronounced (see cases referred to in Smith's Leading Cases, Vol. II, page 439[1]), and the effect of a decree in a suit for a divorce *a vinculo matrimonii* is to cause the relationship of husband and wife to cease. It is conclusive upon all persons that the parties have been divorced, and that the parties are no longer husband and wife; but it is not conclusive nor even *primâ facie evidence against strangers that the cause, for which the decree was pronounced, existed.* For instance, if a divorce between A and B were granted upon the ground of the adultery of B with C, it would be conclusive as to the divorce, but it would not be even *primâ facie* evidence against C that he was guilty of adultery with B, unless he were a party to the suit. So if a marriage between Mahomedans were set aside upon the ground of consanguinity or affinity—as, for instance, in the case of a Mohamedan, that the marriage was with the sister of another wife then living—the decree would be conclusive that the marriage had been set aside, and that the relationship of husband and wife had ceased, if it ever existed; but it would be no evidence as against third parties, for example, in a question of inheritance, that the two ladies were sisters.

It is unnecessary to consider the principle upon which grants of probate and of letters of administration have been held to be conclusive upon third parties. It would throw no light upon the present question, and the Indian Succession Act, No. X of 1865, Section 242, points out expressly the effect which they are to have over property, and the extent to which they are to be conculsive.

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[1] See Section 43, *post.*

It is quite clear that there are no judgments *in rem* in the Mofussil Courts, and that, as a general rule, decrees in those Courts are not admissible against strangers, either as conclusive or even as *primâ facie* evidence, to prove the truth of any matter directly or indirectly determined by the judgment, or by the finding, upon any issue raised in the suit whether relating to *status*, property, or any other matter.[1]

If a judgment in a suit between A and B that certain property, for which the suit was brought, belonged to A, as the adopted son of C, were a judgment *in rem*, and conclusive against strangers as to the fact and validity of the adoption, the greatest injustice might be caused.

For instance, suppose that a Hindú, one of four brothers, should be entitled to a separate estate consisting of a large zemindarí, yielding an annual profit of two lacs of rupees, and also of a small piece of land in a distant zemindarí, and that, upon his death without issue and without leaving a widow, the surviving brothers, as his heirs, should enter into possession, and sell the small piece of land, and that afterwards a person claiming to be the adopted son of the deceased brother should sue the purchaser in the Munsif's Court to recover the land so sold upon the ground that he, being the heir by adoption, the brother of the deceased had no title to sell it. The purchaser might be a poor man without the means of procuring or paying for the attendance of the necessary witnesses, or of making a proper defence to the suit, and the claimant without any collusion in establishing the alleged adoption might succeed and recover the land. Moreover, the purchaser might not have the means to enable him to appeal. Now, if this judgment were a judgment *in rem*, and conclusive against the brothers as to the *status* created by the alleged adoption in a suit brought against them for the zemindarí, they would have no means of defending their possession, however clearly they might be able to prove that there was no foundation whatever in support of the claim of adoption. Assume that the purchaser in the Munsif's Court was perfectly honest and *bonâ fide*, and that the Munsif's Court was one of competent jurisdiction, having regard to the situation and value of the property, and hold that the decree was a judgment *in rem*, and there would be no means of getting rid of the decree of the Munsif's Court, and thus the decree of the Munsif in a suit for land within his competency would finally and conclusively determine the title to the zemindarí against persons who might never have heard of the suit in the Munsif's Court whilst it was going on. There is no ground upon which it could be held that the decree in such a case would be admissible merely as *primâ facie* evidence. It must either be conclusive as a judgment

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[1] But see now Section 13, *ante*, pp. 86—87: and Sections 42 and 43, *post* p. 234.

in rem, or fall within the general rule, and not be admissible at all upon the question of adoption. If it could be admitted as even *primâ facie* evidence, it might work the greatest injustice by throwing the burden on the defendants, and compelling them to prove a negative, *viz.*, that the claimant had not been adopted; and this, probably after many years from the time at which the adoption is alleged to have been made. The fact is that the Munsif in such a case would be competent to try the rights of the parties to the lands claimed, and *incidentally to determine the question of adoption.* But he would have no power to entertain a suit merely for the purpose of determining a question of *status.*

We have no hesitation in answering both the questions in the negative, and in stating that the judgment of the 26th September, 1853, was not admissible either as *primâ facie* or conclusive evidence against the plaintiff upon the question of adoption.

This decision is quite in accordance with the decision of the Privy Council in the Rajah of Shiva Gunga's case, reported in 9 Moore's Indian Appeals, page 539. In that case, their Lordships remarked that 'a judgment is not a judgment *in rem*, because in a suit by A for 'the recovery of an estate from B, it has determined an issue raised 'concerning the *status* of a particular person or family. It is clear that 'this particular judgment was nothing but a judgment *inter partes.*'

In the case No. 299 of 1864, in consequence of which this case was referred to the Full Bench, the Judges, referring to the Shiva Gunga case. say:—'In 'Goodeve on Evidence,'* adoption like marriage and bastardy is expressly mentioned as one of the cases in which a judgment would be final and conclusive. The reasoning of their Lordships of the Privy Council in the case† reported at pages 36 and 37 of the *Weekly Reporter* for April 1865, No. 12, seems to point to the same conclusion.' So far from this being the case, the decision of the Privy Council appears to us to be in direct opposition to the rule laid down by Mr. Goodeve."

* Pp. 288, 290.

† The Shiva Gunga case.

The term "judgment *in rem*" is not, it may be observed, used in the Indian Evidence Act, while Section 41 of the Act incorporates the law on the subject of judgments *in rem*, as explained in the above decision of the Calcutta High Court. It may not, however, be out of place to give some account of the origin and meaning of a term, as to which some confusion of idea has occasionally existed. I venture to think that an accurate conception of what the term itself implies, and of how it came to imply this, will conduce to a clear understanding of the law, and to its correct application.

Meaning of the term *in rem.*

In all the instances in which the phrase *in rem* occurs, the subject to which it is applied is a something which avails generally, *quod generatim in causam aliquam valet.* "How the phrase '*in rem*' came to acquire this meaning," says Mr. Austin, "it is not very easy to perceive. It is one of the elliptical expressions with which language abounds, and which too frequently obscure the simplest and easiest notions. In this instance it might be possible to restore the links which are dropped to connect '*res*' (as signifying a thing) with '*in rem*' (as signifying *generality*); but I have neither space nor time for merely etymological researches. To mark the important purpose to which the phrase may be turned, is matter of more moment. Although it is applied by the Roman lawyers to a considerable number of cases, they always apply it partially. They nowhere use it for the purpose of signifying briefly and unambiguously 'rights of *every* description which avail against persons *generally*.' The large generic expression '*jus in rem*' is not to be found in their writings. This expression was devised by the Glossators, or by the Commentators who succeeded them. Seeing that the phrase '*in rem*' always imported *generality*, and feeling the need of a term for '*rights* which avail generally,' they applied the former to the purpose of marking the latter and talked-of '*jura in rem.*' . . . . . Now, the expression '*jus in rem*,' in this its analogical meaning, perfectly supplies the *desideratum* which is stated above. For as '*in rem*' denotes *generality*, '*jus in rem*' should signify *rights* availing against persons *generally*. Therefore it should signify *all* rights belonging to that *genus*, let their specific differences be what they may."[1]—The phrase '*in rem*' in the expression '*jus in rem*' does not therefore mean 'over or against a thing,' nor has it any reference to *things* as the subject of rights; but it means 'generally.' To use Mr. Austin's language, 'the phrase *in rem*' denotes the *compass*, and not the *subject*, of the right. It denotes that the right in question avails *against the world at large.* Comparing the phrase '*jus in rem*' with the other phrase '*jus in personam*,' Mr. Austin remarks: '*Jus in personam*' *(certam sive determinatam)* is expressive and free from ambiguity. Cut down to '*jus in personam*' it is also sufficiently concise. *Jus in rem*, standing by itself, is ambiguous and obscure, but when it is *contradistinguished* from *jus in personam*, it catches a borrowed clearness from the expression to which it is opposed."[2]

Jus in personam, therefore, means a right which avails *exclusively* against a *determinate* person or against *determinate* persons. *Jus in rem* means a right which avails *against the world at large.*[3]

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[1] *Austin's Lectures on Jurisprudence*, pp. 991 and 992: Edition of 1869, by Robert Campbell. London: John Murray.

[2] *Idem*, p. 990.

[3] *Idem*, pp. 380, 814.

Mr. Austin gives the following example: A contracts to deliver a certain movable to B. If A neglect or refuse to deliver, B can sue him to compel delivery or for damages for non-delivery. B has, in fact, a *jus in personam*, or right against a determinate person A, but has no right against strangers to the contract between him and A. If, however, A deliver the movable to B, in consequence of the delivery by A and the concurring apprehension by B, the thing becomes the property of B, who acquires a *jus in rem*, a right *over* the thing, or a right *in* the thing as against all mankind.

Mr. Austin then points out very clearly that *jura in rem* are of three kinds:

Jura or Rights *in rem.*

I.—Rights *in rem*, which are rights over *things*;

II.—Rights *in rem*, which are rights over *persons;*

III.—Rights *in rem*, which have *no determinate subjects* (persons or things).

Of the *first* class, the *movable* already referred to is a sufficient *illustration.* After delivery, it becomes the property of B as against all the world. B acquires therein a *jus in rem.*

Treating of the *second* class, Mr. Austin points out that a person who is the *subject* of *jus in rem* is placed in a position *like* the position of a *thing* which is the subject of a similar right, and may be styled by analogy *a thing.*[1] He gives as examples of this class the right of the father to the custody and education of the child, and that of the guardian to the custody and education of his ward, and the correlating conditions of husband and wife. "But considered from another aspect," says he, "these rights are of another character, and belong to another class. Considered from that aspect, they avail against persons *generally* or against the world at large, and the duties to which they correspond are invariably *negative.* As against other persons generally, they are not so much rights to the custody and education of the child, &c., as rights to the *exercise* of such rights *without molestation by strangers.* As against strangers, their substance consists of duties incumbent upon strangers, to forbear or abstain from acts inconsistent with their scope or purpose."

Passing to the *third* class, Mr. Austin gives the following examples: A man's right or interest in his *good name*, which right avails against persons, as considered generally and indeterminately; a monopoly or the right of selling exclusively commodities of a given class, all persons *other* than the party in whom the right resides being bound to forbear from selling commodities of this particular class; franchises; and,

[1] *Idem*, pp. 396—397.

lastly, a right in a *status* or condition (considered as an aggregate of rights and capacities). "To determine precisely what a *status* is, is, in my opinion," says Mr. Austin, "the most difficult problem in the whole science of jurisprudence." Elsewhere he lays down the following propositions as to what constitutes a *status* :—

Status.

1*st*,—.The notion is not capable of being fixed with perfect exactness. There are sets of rights and duties, capacities and incapacities, which one person might deem to constitute *status*, while another might refer them to the law of Things.

2*nd*,—The distinction between the rights and duties, capacities and incapacities constituting a *status*, and any other rights, duties, capacities and incapacities, is not susceptible of any strict definition.

3*rd*,—There is no generic character common to them all, but they bear the following marks:—(*a*) They reside in an individual as belonging to a class; (*b*) the rights and duties, capacities and incapacities constituting a *status*, commonly impart to the party invested with them a conspicuous character, and have an extensive influence over his social relations, though this is not a certain mark of *status*; (*c*) they regard specially the class of persons by whom the *status* is borne; (*d*) this last circumstance constitutes the *rationale* of the distinction between the law of Things and the law of persons.

The following remarks of Mr. Austin are also valuable:—"The reason why *status* or *condition* makes so little figure in the English law as compared with the Roman, though the idea must of course exist in all systems of law, seems to be this, that the right in a *status* may by the Roman law be asserted directly and explicitly by an action expressly for its recovery, while in English law no such action can be brought, and the right to a *status*, though of course it often becomes the subject of a judicial decision, almost always comes in as an episode incidental to an action of which the direct purpose is something else. Thus a question of legitimacy, which is precisely a question of *status*, is usually brought in and decided upon incidentally in an action of ejectment..... ....The only case in which a question of *status* is decided directly in English law is when a jury is summoned to try that precise question as an *issue* incidental to a suit in another Court"[1] The term "legal character," used in the Indian Evidence Act, is, as near as may be, the English equivalent for *status*. See also as to *status*, Westlake's Private International Law, pp. 379—389.

So far of *jura in rem;* but what of *judgments in rem?* Is every judgment which creates a *jus in rem*, a *judgment in rem?* I venture to think not; at least, if by *jus in rem* is meant all that class of rights

[1] *Idem*, pp. 401—402.

which the Glossators or Commentators designed to express by this phrase as opposed to those rights which they distinguished by the other phrase, *jus in personam.* Suppose, for instance, a successful action for the *movable*, which Mr. Austin gives as an example in speaking of the *first* class above-mentioned of rights *in rem* over things. B having obtained the movable by the action of a Court of Justice, would acquire in it a *jus in rem* none the less than if A had delivered it voluntarily; but such a judgment would not be a *judgment in rem.* It is, therefore, possible for a judgment to create a *jus in rem* over a thing (the last three words are not a translation of the two that precede them) without being a judgment *in rem.* With regard to *jura in rem*, which are rights over persons (the *second* class), Mr. Austin observes that all, or nearly all of them, are matter for the law of persons and the law of *status.* As to the *third* class, in so far as they are concerned with *status*, I have already given Mr. Austin's remarks. The more these remarks and Mr. Austin's whole dealing with the subject are examined, the more clear it will be, and the stronger will grow the conviction that every judgment which creates a *jus in rem* is not a *judgment in rem.* It is true that every *judgment in rem* creates a *jus in rem*, but the converse of this proposition is not true. In fact, I venture to think that there is no more exact connection between the term *jus in rem* (which was a phrase invented by the later civilians on the analogy of a term which was used, as Mr. Austin says, by the Roman lawyers in a very much more partial sense) and the term *judgment in rem* (which was a phrase invented by lawyers of a later age), than there was between the *jus in rem* of the civilians and the term from which it was borrowed, and which was used by the Roman lawyers. I take the truth to be this. According to the Roman system there were certain forms of proceeding by which claims could be advanced against all men. These were called *actiones in rem* (see Sandar's note on Section 1, Book 4, Title 6 of the Institutes of Justinian), or *real actions.* "A real action," says Lord Mackenzie (Studies in Roman Law, p. 307), "is that which arises from a right in the thing itself—*in re* either as proprietor, &c.," *i. e.*, a right as against every one else. "A personal action is founded on an obligation undertaken by another." Mr. Sandars and Lord Mackenzie think that *in rem* in the phrase *jus in rem*, invented by the civilians, corresponds to *in re* in the phrase *jus in re* used by the classical jurists, but I apprehend that this not so. *Jus in re* meant *jus in alienâ re.* A servitude over another man's land, for example, was a *jus in re.* The term '*in rem*' is found in Justinian and elsewhere; but in connection with "*actio*," not with "*jus*." It was called an *actio in rem* (see Justinian's Institutes, Book 4, Title 6, Section 1), in opposition

Judgments *in rem* v. *Jura in rem.*

to an *actio in personam*, because the former action went upon the right to or over the thing, the latter went upon the right against or over the individual. The effect of the latter action was to conclude the individual only, the effect of the action *in rem* was to conclude the whole community. This effect was an accident arising from the particular system, but those who have studied the curious history of words and their meanings well understand how natural it was that the words '*in rem*' should remain to express the effect of this action long after Roman forms of procedure had passed away. It was most natural that the civilians of the 12th or 13th century, when making their division of rights which avail against the world, and rights which avail against individuals only, should select the words "*in rem*" to express the former, or should be led to use them in the very meaning which they had then got to have. "*In rem*" had got to mean "generally," and to be applied to that which avails against all mankind; and out of it and '*jus*' was compounded a term which meant "a right good against the whole world." When lawyers of a later age wanted to express that a judgment availed against the whole world, they took the same term and compounded it with 'judgment.' It may be interesting to note the three stages: 1*st*,—*Actio in rem* created what was in fact a right good against all mankind. 2*nd*,—The civilians applied the term *jus in rem* as a class-term to all such rights; but it is clear that all such rights were not the creation of the Roman *actio in rem*, *i. e.*, that there were *jura in rem* other than those which were created by *actiones in rem*. 3*rd*,—Later lawyers coined the term *judgment in rem* to express a judgment which has the same essential difference from other judgments, *viz.*, being good against all mankind, as a *jus in rem* has from other *jura;* but it does not follow as a necessary consequence from this that all judgments which create *jura in rem* are '*judgments in rem*.'

Mr. Austin points out that "*in rem*" denotes the *compass*, not the *subject* of the right. So '*in rem*' denotes the *compass* not the *subject* of the judgment. '*Judgment in rem*' is a name given to a particular *kind* of judgment. What kind, the words "*in rem*" do not indicate, save by their history as I have attempted to give it. The effect of such a judgment is not to be explained by the nature of the procedure necessary to obtain it. Sir Barnes Peacock has very clearly shown Mr. Justice Holloway's error in trying to explain it on the principle that every one is presumed to have had notice of the suit for if they had notice, they could not intervene or interfere.

I think the result then is, that the only definition of '*judgment in rem*' which can properly be given is, that it is a "judgment which binds all men, and not only the parties to the suit in which it was passed and their privies;" and that it belongs to positive law to say wha

judgments are to be judgments *in rem*, whether for reasons of international comity and expediency, or of domestic utility. As the above Section of the Indian Evidence Act stands, a judgment to have this effect must have been pronounced by a *competent* Court, in the exercise of Probate, Matrimonial, Admiralty, or Insolvency jurisdiction.

Probate.

Civil Courts in India, other than the High Courts, have *probate* jurisdiction under the provisions of the Indian Succession Act, X of 1865 (see Part XXXI, Section 235, and following Sections. As to Hindús, &c., see Act XXI of 1870). A grant of *probate* or of *administration* actually invests the executor or administrator with the character which it declares to belong to him, and is conclusive against all the world. It may, indeed, be shown that the grant was revoked, for that is the further act of the same Court; or that it was forged, for that shows it not to be the act of the Court at all; or that it was granted by a Court having no jurisdiction,[1] for then it is a nonentity. But it cannot be shown that the testator was mad or that the *will* was forged, for those facts might have been alleged in the Court which had jurisdiction to grant probate or administration, in opposition to such grant.[2]

Matrimonial Jurisdiction.

Civil Courts in India other than the High Courts, have Matrimonial jurisdiction under the following Acts, now in force, *viz.*, IV of 1869, "The Indian Divorce Act," relating to the divorce of persons professing the Christian Religion; XV of 1865, relating to divorce among Parsís; XXI of 1866, "The Native Converts' Marriage Dissolution Act;" XV of 1872, "The Indian Christian Marriage Act;" XV of 1865, relating to marriage among the Parsís; and III of 1872, relating to marriage between persons not professing the Christian, Jewish, Hindú, Mahommedan, Parsí, Budhist, Síkh, or Jaina religion.[3]

Admiralty Jurisdiction.

As to the Admiralty jurisdiction of the High Courts, see Section 32 of the Letters Patent of 1865 for the Calcutta High Court, and the corresponding Sections of the other Letters Patent for the other High Courts. As to the Admiralty jurisdiction of the Mofussil Courts, see 12 and 13 Vict. Cap. 96; and 23 and 24 Vict., Cap. 88. It is with reference to vessels condemned as *prizes* more especially that questions concerned with Admiralty jurisdiction arise, such a sentence of condemnation by a competent Court being conclusive upon all the world.

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[1] See Section 44, *post*.

[2] See 2 Smith's Leading Cases, p. 675. As to the Probate Jurisdiction of Foreign Courts, see Westlake's Private International Law, pp. 278--310.

[3] With reference to the judgments and orders of Foreign Courts in matrimonial causes, see Westlake's Private International Law, pp. 315--360.

Insolvency Jurisdiction.

For the law regulating the Insolvency jurisdiction of the High Courts, see the 11 and 12 Vict., Cap. 21; and for the Calcutta High Court, Section 18 of the Letters Patent of 1865; and for the other High Courts, the corresponding Sections of their respective Letters Patent. The Mofussil Courts (save in the Panjáb, perhaps) have no Insolvency jurisdiction. A Bill was lately introduced in order to confer such jurisdiction upon them.[1]

The Section is silent as to Courts-Martial, with reference to which see 2 Smith's Leading Cases, 681. It may be observed that a judgment *in rem* will, under the above Section of the Indian Evidence Act, be conclusive in a criminal equally with a civil proceeding, a proposition as to which there is some doubt in English Law, see 2 Smith's Leading Cases, 676—677: and Tay. §§ 1493—1494.]

Judgment, order or decree between third parties when irrelevant and when not.

42. Judgments, orders or decrees other than those mentioned in section forty-one, are relevant if they relate to matters of a public nature relevant to the enquiry; but such judgments, orders or decrees are not conclusive proof of that which they state.

Illustration.

A sues B for trespass on his land. B alleges the existence of a public right of way over the land, which A denies.

The existence of a decree in favour of the defendant, in a suit by A against C for a trespass on the same land, in which C alleged the existence of the same right of way, is relevant, but it is not conclusive proof that the right of way exists.

[See *ante*, pp. 87, 129, and 138. As to "conclusive proof," see *ante*, p. 76.]

What judgments, &c., not relevant.

43. Judgments, orders or decrees, other than those mentioned in sections forty, forty-one, and forty-two, are irrelevant, unless the existence of such judgment, order or decree, is a fact in issue, or is relevant under some other provision of this Act.

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[1] As to the effect of Foreign Judgments in Bankruptcy and Insolvency, see Westlake's Private International Law, pp. 262—278.

Illustrations.

(a.) A and B separately sue C for a libel which reflects upon each of them. C in each case says, that the matter alleged to be libellous is true, and the circumstances are such that it is probably true in each case, or in neither.

A obtains a decree against C for damages on the ground that C failed to make out his justification. The fact is irrelevant as between B and C.

(b.) A prosecutes B for adultery with C, A's wife.

B denies that C is A's wife, but the Court convicts B of adultery.

Afterwards, C is prosecuted for bigamy in marrying B during A's lifetime. C says that she never was B's wife.

The judgment against B is irrelevant as against C.

(c.) A prosecutes B for stealing a cow from him. B is convicted.

A, afterwards, sues C for the cow, which B had sold to him before his conviction. As between A and C, the judgment against B is irrelevant.

(d.) A has obtained a decree for the possession of land against B. C, B's son, murders A in consequence.

The existence of the judgment is relevant, as showing motive for a crime.

[In order to prove *the existence of a judgment, its date or its legal consequences*, the production of the record or of a certified copy (see Section 76, *post*) is conclusive evidence against all the world. Thus, though a judgment against A will not be evidence against B, except in those cases which have been already provided for by the Evidence Act, yet, where A sues B for negligence as his agent, he may, to prove the *consequences* of the negligence to himself, produce the record of a judgment obtained against him by a third party in an action brought in consequence of that negligence. Such judgment is evidence as to the quantum of damages, though not as to the fact of the injury.[1] Again, if a person charged with an offence under the Indian Penal Code were acquitted, the record would be conclusive evidence to establish the *fact of acquittal* in a civil suit by him against the prosecutor to recover damages for malicious prosecution; but it would be no evidence that the defendant in the civil suit was the prosecutor in the criminal case, or

[1] See 2 Smith's Leading Cases, 661, and cases there cited.

of malice; or of want of probable cause; and the defendant notwithstanding such acquittal would be entitled to prove the plaintiff's guilt.[1] So a judgment recovered against a surety will be evidence for him, to prove the *amount* which he has been compelled to pay for the principal debtor, but it will be no evidence of his having been legally liable to pay that amount through the principal's default. If one of two or more persons, who have jointly borrowed money, and have executed a joint bond, be sued for and have to pay the whole debt, the judgment will be evidence of the amount which he had to pay, if he afterwards sue his co-obligors for contribution, but it will be no evidence of the genuineness of the bond, of the joint liability, or of the shares in which the co-obligors are respectively liable. A, B, and C were joint owners of certain land. During the minority of C, A and B gave a *maurasi* lease to X. C, on attaining his majority, sued A, B, and X successfully to have this lease set aside. Upon this X sued A and B to recover the one-third portion of the purchase-money which represented C's share, alleging fraud on their part. It was held that the judgment in the previous case was not evidence of the fraud so alleged (*Durga Charan Bhattacharjya and others* v. *Shusi Bhúsan Mittra and another*, V W. R. S. C. C. Ref. 23). Upon a trial for intentionally giving false evidence in a stage of a judicial proceeding (Section 193 of the Indian Penal Code), the record will be evidence that there was a judicial proceeding and of the stage in which the evidence charged as false was given. In a trial for intentionally or negligently suffering to escape a person *convicted* of an offence (Sections 222-223 of the Penal Code) the record will be evidence of the conviction. In an action to recover lands, a decree in a suit between the defendant's father and other persons unconnected with the plaintiff, which directed that the father should be let into possession of the estate *as his own property*, was held admissible on behalf of the defendant, not as proof of any of the facts therein stated, but for the purpose of explaining *in what character* the father, through whom the defendant claimed, had afterwards taken actual possession of the estate.[2] The principle upon which judgments *inter alios* are thus admitted is explained by English text-writers to be this, that the *record is matter of inducement* or merely introductory to other evidence.

Judgment in Criminal case not evidence in Civil case, or *vice versa*.

It is a general rule, which has been acknowledged and followed in India as well as in England, that a judgment in a criminal case (unless, indeed, admissible as evidence in the nature of reputation) cannot be received in a civil action to establish the truth of the facts upon which it was rendered, and that a judgment

[1] Taylor on Evidence, § 1480, and cases there cited.

[2] *Davies* v. *Lowndes*, 6 Manning and Granger's Rep. 471, 520.

in a civil action cannot be given in evidence for such a purpose in a criminal prosecution (Tay. § 1505, and cases there cited; *Nityanand Surma and others* v. *Kashinath Neiyalankar*, V W. R. Civ. Rul. 26; *Bissonath Neogí* v. *Hara Gobind Neogí and others*, V W. R. Civ. Rul. 27; *Keramatula Chaudhrí* v. *Golam Hosen*, IX W. R. Civ. Rul. 77; *Ali Baksh Doctor and another* v. *Sheikh Samirudín*, IV B. L. R. Civ. Rul. 31). A plea of *guilty* may, however, be evidence of an admission (*Shambhú Chandra Chaudhrí* v. *Madhú Keibart and others*, X W. R Civ. Rul. 56).

In suits to set aside alienation made by Hindú widows and other Hindú proprietors, who have not an absolute and complete interest in the property, the question is often raised, whether or not such alienations were made for *necessary* purposes. In proof of such necessity decrees are frequently produced without evidence being given of the circumstances under which the debts were contracted, for the realization of which these decrees were obtained. Upon the priciples above stated such decrees, though good evidence of the *amount* paid, are not evidence of *necessity* (*Babú Kantu Lal and others* v. *Babú Giridharí Lal and others*, V R. C. & C. R. 266; X W. R. Civ. Rul. 24).

Fraud, collusion, and incompetency of Court may be proved.

44. Any party to a suit or other proceeding may show that any judgment, order or decree which is relevant under section forty, forty-one, or forty-two, and which has been proved by the adverse party, was delivered by a Court not competent to deliver it, or was obtained by fraud or collusion.

[A judgment delivered by a Court not competent to deliver it, *i. e.*, by a Court which had no jurisdiction over the subject-matter of the suit, is a mere nullity. On the subject of "*jurisdiction*," see *ante*, pp. 173—195.

Judgments obtained by Fraud.

With respect to *fraud* or *collusion*, Lord Chief Justice DeGrey remarked as follows in the Duchess of Kingston's case:—"Fraud is an extrinsic collateral act, which vitiates the most solemn proceedings of Courts of Justice. Lord Coke says, it avoids all judicial acts, ecclesiastical or temporal."[1] In *Philipson* v. *The Earl of Egremont*, the Court of Queen's Bench observed that fraud no doubt vitiated everything: and the Court, upon being satisfied of such fraud, has a power to vacate and should vacate its own judgment.[2] "There is," said Pollock, C.B., "no more stringent maxim than that *no man shall*

[1] 2 Smith's Leading Cases, 650.

[2] 6 Adolphus and Ellis' Queen's Bench Rep. 587, 605.

be permitted to aver against a record; but where fraud can be shown this maxim does not apply.[1] In the case of the *Earl of Bandon* v. *Becher*,[2] the House of Lords observed that the validity of a decree of a Court of competent jurisdiction upon parties legally before it may be questioned, on the ground that it was pronounced through fraud, contrivance, or covin of any description, or not in a real suit, or, if pronounced in a real and substantial suit, *between parties, who were really not in contest with each other.*" In applying the rule, it makes no difference whether the judgment impugned has been pronounced by an inferior tribunal, or by the highest Court of Judicature in the land; but in all cases alike it is competent for every Court, whether superior or inferior, to treat as a nullity any judgment which can be clearly shown to have been obtained by manifest fraud.[3]

What is Fraud.

The Indian Evidence Act contains no definition of the terms "fraud" and "collusion." Writers on Equity distinguish two kinds of fraud, *viz.*, Actual or Positive Fraud, and Constructive Fraud. The former is applied to those cases in which there is an *intention* to commit a cheat or deceit upon another person to his injury. "By *constructive* frauds are meant," says Mr. Story,[4] "such acts or contracts, as, although not originating in any actual evil design or contrivance to perpetrate a positive fraud or injury upon other persons, are yet, by their tendency to deceive or mislead other persons, or to violate private or public confidence, or to impair or injure the public interests, deemed equally reprehensible with positive fraud, and, therefore, are prohibited by law as within the same reason and mischief as acts and contracts done *malo animo*." It is only in connection with the subject of *actual* or *positive* fraud that Mr. Story mentions frauds in verdicts, judgments, decrees, and other judicial proceedings.[5]

"Fraud" defined.

The following definition of *fraud* is given in the 17th Section of the Indian Contract Act, IX of 1872, and may, perhaps, be usefully borne in mind:—

"Fraud means and includes any of the following acts committed by a party to a contract, or with his connivance, or by his agent, with intent to deceive another party thereto or his agent, or to induce him to enter into the contract:—

(1.)—The suggestion, as a fact, of that which is not true, by one who does not believe it to be true;

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[1] *Rogers* v. *Hadley*, 2 Hurlstone and Coltman's Rep. 247.

[2] 3 Clark and Finnelly's Rep. 510.

[3] *Shedden* v *Patrick*, 1 Macqueen's Scotch Cases, House of Lords, 535.

[4] Equity Jurisprudence, § 258.

[5] Equity Jurisprudence, § 252.

(2.)—The active concealment of a fact by one having knowledge or belief of the fact;

(3)—A promise made without any intention of performing it;

(4)—Any other act fitted to deceive;

(5.)—Any such act or omission as the law specially declares to be fraudulent.

Explanation.—Mere silence as to facts likely to affect the willingness of a person to enter into a contract is not fraud, unless the circumstances of the case are such that, regard being had to them, it is the duty of the person keeping silence to speak, or unless his silence in itself is equivalent to speech."—

Collusion.

"Collusion" is defined to be a deceitful agreement or compact between two or more persons to do some act in order to prejudice a third person, or for some improper purpose. Collusion in judicial proceedings is a secret agreement between two persons that the one should institute a suit against the other, in order to obtain the decision of a judicial tribunal for some sinister purpose. It may be of two kinds,—(1) when the facts put forward as the foundation of the judgment of the Court do not exist; (2) when they exist, but have been corruptly preconcerted for the express purpose of obtaining the judgment.[1]

Who may show Fraud or Collusion.

That *strangers* to the suit in which a judgment has been obtained by fraud or collusion may give evidence of such fraud or collusion for the purpose of defeating the judgment, is a proposition as to which there has never been any doubt; but, whether an innocent *party* to the suit may show such fraud and collusion, is a point upon which the authorities under English law are not agreed. It is said that his proper course is to apply to the Court which pronounced the judgment to vacate it. That a guilty party would not be allowed to defeat a judgment by showing that in obtaining it he had practised an imposition on the Court is wholly in accordance with the legal maxims—*Allegans suam turpitudinem non est audiendus*[2]—*Nemo ex dolo suo proprio relevetur, aut auxilium capiat.*[3] The words of the Section, "*any* party to a suit or other proceeding, &c.," are wide enough to include parties to the first suit, both innocent and guilty. It may be questionable if it was intended to include the latter; but see *Ram Saran Singh and others* v. *Mussamat Pran Piyari and others*, I W. R. Civ. Rul. 156.

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[1] See Wharton's Law Lexicon, Title "Collusion."

[2] "A person alleging his own infamy is not to be heard."

[3] "No one can be relieved or gain an advantage from his own proper deceit."

OPINIONS OF THIRD PERSONS WHEN RELEVANT.

Opinions of experts.

45. When the Court has to form an opinion upon a point of foreign law, or of science or art, or as to identity of handwriting, the opinions upon that point of persons specially skilled in such foreign law, science or art [or in questions as to indentity of handwriting[1]], are relevant facts.

Such persons are called experts.

Illustrations.

(*a.*) The question is, whether the death of A was caused by poison.

The opinion of experts as to the symptoms produced by the poison by which A is supposed to have died, are relevant.

(*b.*) The questions is, whether A, at the time of doing a certain act, was, by reason of unsoundness of mind, incapable of knowing the nature of the act, or that he was doing what was either wrong or contrary to law.

The opinions of experts upon the question whether the symptoms exhibited by A commonly show unsoundness of mind, and whether such unsoundness of mind usually renders persons incapable of knowing the nature of the acts which they do, or of knowing that what they do is either wrong or contrary to law, are relevant.

(*c.*) The question is, whether a certain document was written by A. Another document is produced which is proved or admitted to have been written by A.

The opinions of experts on the question whether the two documents were written by the same person or by different persons, are relevant.

[As to *foreign law*, see also Section 38, *ante*, p. 169 In connection with the same subject may be considered the provisions of 22 & 23 Vict. Cap 63, and 24 Vict., Cap. 11. The preamble to the former Statute recites that great improvement in the administration of the law would ensue if facilities were afforded for more certainly ascertaining the law administered in one part of Her Majesty's dominions when pleaded in the Courts of another part thereof. Section 1 then enacts

22 & 23 Vict., Cap. 63., A.D. 1859.

[1] The words in brackets were added by the amending Act, XVIII of 1872.

that if in any action[1] depending in any Court within Her Majesty's dominions, it shall be, in the opinion of such Court, necessary or expedient for the proper disposal of such action to ascertain the law applicable to the facts of the case as administered in any other part of Her Majesty's dominions *on any point on which the law of such other part is different* from that in which the Court is situate, it shall be competent to the Court to *direct a case to be prepared* setting forth the facts, as they may be ascertained by verdict of a jury or other mode competent, or may be agreed upon by the parties, or settled by such person or persons as may have been appointed by the Court for that purpose in the event of the parties not agreeing; and upon such case being approved by such Court or a Judge thereof, they *shall settle the questions of law arising out of the same on which they desire to have the opinion* of another Court, and shall pronounce an order remitting the same, together with the case, to the Court in such other part of Her Majesty's dominions, *being one of the superior Courts thereof*, whose opinion is desired upon the law administered by them as applicable to the facts set forth in such case, and desiring them to pronounce their opinion on the questions submitted to them in the terms of the Act. The parties may petition the Court, whose opinion is to be obtained, to hear them or their counsel; and the Court shall, if it see fit, appoint an early day for hearing them, and shall pronounce its opinion. A copy of the opinion, so pronounced, certified by an officer of the Court, shall be given to each of the parties (Section 2), who may lodge the same with an officer of the Court in which the action may be depending, with a notice of motion that such party will on a certain day move the Court to apply such opinion to the facts set forth in the case, and the Court shall thereupon apply such opinion to such facts in the same manner as if it had been pronounced by the Court itself upon a case reserved for its opinion; or the Court may, if it think fit, order the opinion to be submitted to the jury with the other facts of the case, as evidence, or conclusive evidence, as it may think fit, of the foreign law therein stated (Section 3).[2]

24 Vict., Cap. 11, A.D. 1861.

The preamble to the 24 Vict., Cap. 11, referring to the above Statute, recites that it is expedient to afford the like facilities for the better ascertainment, in similar circumstances, of the law of any *foreign*

[1] "Action" is defined by Section 5 to include every judicial proceeding instituted in any Court—Civil, Criminal, or Ecclesiastical.

[2] As an example of a case in which the provisions of this Statute were resorted to, see *Login and another* v. *Princess Victoria Gouramma of Coorg*, I Jur. O. S. 109. The Court of Chancery in England here forwarded a case on Hindú Law to the Supreme Court at Calcutta.

country or State with the Government of which Her Majesty may be pleased to enter into a convention for the purpose of mutually ascertaining the law of such foreign country or State when pleaded in actions depending in any Courts within Her Majesty's dominions, and the law as administered in any part of Her Majesty's dominions when pleaded in actions depending in the Courts of such foreign country or State. Section 1 then makes provisions similar to those above-mentioned empowering superior Courts within Her Majesty's dominions, in any action depending in them, to remit a case with queries to such superior Court in such foreign State or country as shall be agreed upon in the convention. The provisions as to obtaining a copy of the opinion delivered by the foreign Court, and moving the Court in which the case is depending, to apply it, are similar to those already noticed. Then follows a proviso (Section 2) empowering the latter Court, if it be satisfied that the facts were not properly understood by the foreign Court, or if it be doubtful on any ground whether the opinion does correctly represent the foreign law as regards the facts to which it is to be applied, to remit the case with or without alterations or amendments to the same or to any other such superior Court in such foreign State as aforesaid. Section 3 empowers *any Court* of a foreign country or State, with whose Government Her Majesty shall have entered into a convention, to remit to the Court in Her Majesty's dominions whose opinion is desired a case setting forth the facts and the question of law arising out of the same, and directs such Court to proceed to pronounce an opinion and to give a certified copy thereof to the parties in manner similar to that provided for by the above Statute first mentioned. It may be observed that, under the provisions of the 22 & 23 Vict., Cap. 63, any Court, superior or inferior, may obtain the opinion on a question of law of a superior Court in another portion of Her Majesty's dominions; whereas, under the 24 Vict., Cap. 11, it is only a superior Court in Her Majesty's dominions which can obtain the opinion of a foreign Court, while it appears that any foreign Court, superior or inferior, can obtain the opinion of a Court, superior or inferior, in Her Majesty's dominions.

With reference to experts in science, art, or handwriting, the following extract from Mr. Taylor's work is valuable :—

What is a Science or Art?

"It may be laid down as a general rule, that the opinion of witnesses possessing peculiar skill is admissible whenever the subject-matter of inquiry is such that inexperienced persons are unlikely to prove capable of forming a correct judgment upon it without such assistance : in other words, when it so far partakes of the character of a science or art as to require a course of previous habit or study, in order to obtain a competent knowledge of its nature. On the

other hand, it seems equally clear that the opinions of skilled witnesses cannot be received when the inquiry relates to a subject which does not require any peculiar habits or course of study in order to qualify a man to understand it. Therefore witnesses are not permitted to state their *views on matters of moral or legal obligation*, or on the manner in which other persons would *probably have been influenced*, had the parties acted in one way rather than another.....The opinions of scientific witnesses are admissible in evidence not only where they rest on the personal observations of the witness himself, and on facts within his own knowledge, but even where they are merely *founded on the case as proved by other witnesses* on the trial. But here the witness cannot in strictness be asked his opinion respecting the very point which the jury" (or in India the Court) "are to determine. For instance, if the question be whether a particular act, for which a prisoner is tried, were an act of insanity, a medical man, conversant with that disease, who knows nothing of the prisoner, but has simply heard the trial, cannot be broadly asked his opinion as to the state of the prisoner's mind at the time of the commission of the alleged crime; *because such a question involves the determination of the truth of the facts deposed to, as well as the scientific inference from those facts.*"[1] He may, however, be asked what judgment he can form on the subject, *assuming the facts stated in evidence to be true.* As to the opinions of experts, see also the penultimate paragraph of Section 60, *post.*[2]

Evidence of Experts to be received with caution.

The evidence of *experts* is to be received with great caution, not on the ground that they wilfully misrepresent what they think, but because their judgments become so warped by regarding the subject in one point of view, that, though most conscientiously disposed, they are incapable of expressing a candid opinion. "They come," said Lord Campbell, "with such a bias on their minds to support the cause in which they are embarked, that hardly any weight should be given to their evidence."[3]]

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[1] §§ 1275, 1276, and 1278.

[2] In America it has been determined, upon grave consideration, and in conformity with the doctrine which has always prevailed in the English Ecclesiastical Courts, that where a witness has had opportunities of knowing and observing the conversation, conduct, and manners of a person whose sanity is in question, he may depose not only to particular facts, but to his *opinion* or belief as to the sanity of the party, formed from such actual observation. And so also the subscribing witnesses to a will may give their opinion as to the sanity of the testator (See Tay. § 1278 and cases there cited). This evidence does not seem to be admissible under the Indian Evidence Act, which allows the *opinions of experts only* on such a point. Of course, any witness may speak to *facts*, from which the Court may form its own opinion as to sanity or insanity (see Section 14).

[3] Tracy Peerage Case, 10 Clark and Finnelly's Rep 191.

Facts bearing upon opinions of experts.

46. Facts, not otherwise relevant, are relevant if they support or are inconsistent with the opinions of experts, when such opinions are relevant.

Illustrations.

(*a.*) The question is, whether A was poisoned by a certain poison.

The fact that other persons, who were poisoned by that poison, exhibited certain symptoms which experts affirm or deny to be the symptoms of that poison, is relevant.

(*b.*) The question is, whether an obstruction to a harbour is caused by a certain sea-wall,

The fact that other harbours similarly situated in other respects, but where there were no such sea-walls, began to be obstructed at about the same time, is relevant.

[This Section is in accordance with the rule of English law, see Tay. § 316. It is somewhat analogous to Section 11, *ante*. Illustration (*b*) is taken from the case of *Folkes* v. *Chadd*, 3 Douglas' Rep. 157.]

Opinion as to handwriting.

47. When the Court has to form an opinion as to the persons by whom any document was written or signed, the opinion of any person acquainted with the handwriting of the person by whom it is supposed to be written or signed that it was or was not written or signed by that person, is a relevant fact.

Explanation.—A person is said to be acquainted with the handwriting of another person when he has seen that person write, or when he has received documents purporting to be written by that person in answer to documents written by himself or under his authority and addressed to that person, or when, in the ordinary course of business, documents purporting to be written by that person have been habitually submitted to him.

Illustration.

The question is, whether a given letter is in the handwriting of A, a merchant in London.

B is a merchant in Calcutta, who has written letters addressed to A and received letters purporting to be written by him. C is B's clerk, whose duty it was to examine and file B's correspondence. D is B's broker, to whom B habitually submitted the letters purporting to be written by A for the purpose of advising with him thereon.

The opinions of B, C, and D on the question whether the letter is in the handwriting of A are relevant, though neither B, C, nor D ever saw A write.

Five methods of proving handwriting.

[There are five methods of proving handwriting:—(1) The simplest method is to call the *writer* himself. It is not, however, absolutely necessary to call the writer, as the evidence of any one who saw him write is, equally with his, primary evidence of the fact. (2) Any person who *actually saw the paper or signature written* may be called to prove it. (3) A witness may be called who has obtained a knowledge of, and acquaintance with, the person's handwriting in question by seeing that person write on other occasions. (4) The handwriting may be proved by the evidence of a witness who has acquired a knowledge thereof by having seen *in the ordinary course of business* documents proved, or which may be reasonably presumed, to have been written by the person, whose handwriting forms the subject of inquiry (see *Explanation* and *Illustration*). In the *Fitzwalter Peerage* case[1] it was decided that the evidence of a witness, who had acquired his knowledge of the handwriting not from *a course of business*, but from studying the signatures attached to documents admitted or proved to be genuine, but *not produced*, for the *express purpose* of speaking to the *identity of the writer*,[2] could not be admitted. But when the family solicitor was called and stated that he had acquired a knowledge of the handwriting from having had occasion at different times to examine, *in the course of business*, many deeds and other instruments written or signed by the same ancestor, this was held to be good evidence. (5) Handwriting may be proved by comparison of two or more writings, as to which see Section 73, *post*, and, as to comparison by experts, Section 45, *ante*, and Illustration (*c*) thereto.

These methods of proving handwriting are valuable probably in the order in which they have been placed above. Where a less valuable method of proof is resorted to, it should be borne in mind that this may raise a suspicion that the party is actuated by some improper motive in withholding evidence of a more conclusive nature, if it do not appear that such evidence is not available.]

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[1] 10 Clark and Finnelly's Rep. 193.

[2] Which is different from the *identity of handwriting* (see Section 45, *ante*), the writings to be compared being before the Court (see Illustration (c), *id*).

Opinion as to existence of right or custom, when relevant.

48. When the Court has to form an opinion as to the existence of any general custom or right, the opinions, as to the existence of such custom or right, of persons who would be likely to know of its existence if it existed, are relevant.

Explanation.—The expression 'general custom or right' includes customs or rights common to any considerable class of persons.

Illustration.

The right of the villagers of a particular village to use the water of a particular well is a general right within the meaning of this section,

[Under Clause 4, Section 32 (*ante*, pp. 108, 127—129), evidence may be given of a *statement, written or verbal*, made by a person, who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense, which, under the circumstances of the case appear to the Court to be unreasonable, such statement giving the *opinion* of such person as to the existence of any *public right or custom or matter of public or general interest*, of the existence of which, if it existed, he would have been likely to be aware, and having been made *before any controversy* as to such right, custom, or matter arose. The present Section (48) is concerned with oral evidence given in open Court, and is not governed by the limitation "before any controversy, &c." Having advertence to the meaning attached to the terms "*public*" and "*general*" referred to, *ante*, p. 127, the *Explanation* adopts the sense in which the term "*general*" is used by English writers. The Indian Evidence Act, however, makes no provision for the admission of oral evidence expressing the opinions as to the existence of a *public custom or right*, of persons who would be likely to know of its existence, if it existed. Why oral evidence of opinion should be admitted in the case of a *general, though not of a public custom or right*, is not very obvious. It has been already pointed out (*ante*, p. 129) that the Act admits judgments, orders, or decrees as evidence of *matters of a public nature* (Section 42), but that there is no provision for admitting them as evidence of *matters* of *general interest*. See also as to *custom, right*, &c., Section 13, *ante*, p. 86; and Clause 7, Section 32, *ante*, pp. 109, 136.]

49. When the Court has to form an opinion as to—

Opinions as to usages, tenets, &c., when relevant.

the usages and tenets of any body of men or family,

the constitution and government of any religious or charitable foundation, or

the meaning of words or terms used in particular districts or by particular classes of people,

the opinions of persons having special means of knowledge thereon, are relevant facts.

["The duty of an European Judge, who is under the obligation to administer Hindú Law," said their Lordships of the Privy Council in the case of *The Collector of Madura* v. *Mutu Ramalinga Sathupathi*,[1]

Usage in Hindú Law.

"is not so much to inquire whether a disputed doctrine is fairly deducible from the earliest authorities, as to ascertain whether it has been received by the particular school which governs the district with which he has to deal, and has there been sanctioned by *usage*. For, *under the Hindú system of law, clear proof of usage will outweigh the written text of the law*." And, again, in the case of *Bhyah Ram Singh* v. *Bhyah Agar Singh*, XIII Moo. Ind. Ap. 390—"The compiler of the Mitácshará is said to have been an ascetic or devotee, and from that source nothing at variance with the religion of the Hindús is likely to have flowed. The Hindú law contains in itself the principles of its own exposition. The digest *subordinates in more than one place the language of texts to custom and approved usage*." "Custom," says Strange, "is a branch of Hindú, as it is of our own law"[2]—and again, "*usage* being a branch of Hindú law, which, wherever it obtains, supersedes its general maxims."[3] "Immemorial custom," says Manu, "is transcendent law."[4]

Hindú usage is of two kinds, *viz.*, *Kulachar* or family usage, and *desachar* or local usage. The latter, if it

Kulachar and Desachar.

really exist, being a custom prevalent over a whole district, and not confined to one particular estate, must, from its universality, be more easily susceptible of proof than the former. In order to establish *kulachar*, it must be shown that the custom has been ancient and uninterrupted (*Amritnath Chaudhrí* v. *Gauri Nath Chaudhrí*,

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[1] XII Moo. Ind. Ap. 436; also I B. L. R. P. C. 12; and see *Srímati Matingini Debi* v. *Srímati Jaikali Debi*, V B. L. R. 469.

[2] Hindú Law, Ed. of 1830, Vol. I, p. 256.

[3] *Idem*, Vol. I, p. 251.

[4] Chap. I, p. 138.

VI B. L. R. 238; *Raja Nagendra Narain* v. *Raghonath Narain Deo*, Suth. Rep. Jan.—July, 1864, p. 20).

Ben. Reg. XI of 1793.

Bengal Regulation XI of 1793, after reciting that a custom originating in consideration of financial convenience had been established under the Native administrations, according to which some of the most extensive *zemindarts* are not liable to division, but devolve entire on the eldest son or next heir to the exclusion of other relations, and that this custom is repugnant both to the Hindú and Mahomedan laws which annex to primogeniture no exclusive right of succession to landed property, &c.,—proceeds to rescind this custom, and to enact that, if any zemindar, independent talúkdar, or other actual proprietor of land shall die *without a will, or without having declared by writing or verbally to whom and in what manner his or her landed property is to devolve* after his or her demise, and shall leave two or more heirs, who by the Mahomedan or Hindú Law may be respectively entitled to succeed to a portion of the landed property of the deceased, such persons shall succeed to the shares to which they may be so entitled (Section 2); and they may either hold the property as a joint undivided estate or proceed to effect a division (Section 3). After the passing of this Regulation a custom was found to prevail in the jungle mehals of Midnapúr and *other districts*, by which the succession to landed estates devolved to a single heir without the division of the property. This custom having been found to be long established and to be founded in certain circumstances of local convenience, Regulation X of 1800 was passed

Ben. Reg. X of 1800.

to amend the former Regulation. Section 2 enacts that Regulation XI of 1793 shall not be considered to supersede, or affect any *established usage* which may have obtained in the jungle mehals of Midnapúr and *other districts*, by which the succession to landed estates, the proprietor of which may have died intestate, has hitherto been considered to devolve to a single heir to the exclusion of the other heirs of the deceased. In the mehals in question the *local custom* of the country shall be continued in full force and the Courts of Justice shall be guided by it in the decision of all claims which may come before them to the inheritance of landed property situated in those mehals.[1] As to the construction to be put upon these two Regulations, read together, their Lordships of the Privy Council, in the case of *Rájá Dídar Hosen* v. *Rani Zahúrúnnissa*, II Moo. Ind. Ap. 476, observed as follows:—"It was, however, contended on the part of the appellant, that the Regulation of 1793 was repealed

[1] These two Regulations extend to Bengal, Behar, and Orissa, and are still unrepealed.

with respect to this *zemindári* by another Regulation (X of 1800). .....But it is clear to their Lordships that this latter Regulation did not apply to undivided *zemindarís*, in which a custom might prevail that the inheritance should be indivisible, but only to the jungle mehals and *other entire districts, where local custom prevails.* The construction contended for, *viz.*, that every individual *zemindarí* in which the custom had been that it should descend entire, was exempted, would repeal the Regulation of 1793 altogether; whereas it is clear that it was intended to be partially repealed only." In an earlier portion of the same *judgment*, their Lordships said: "Two grounds, therefore, on which the appellant has rested his claim having failed, it now becomes necessary to dispose of the third, that principally insisted upon in the argument before us, *viz.*, the supposed *family custom* that the zemindarí had never been separated, but devolved entire on every succession, and that such custom was still in force. If the existence of the custom in point of fact was the question to be determined by their Lordships, they would have entertained some doubt upon it; for the circumstance that the zemindarí had been held entire for a very long period would seem to indicate that the ordinary rules of succession had not been applied to it, and gives great countenance to the supposition that such a custom existed. But, supposing that were so, *their Lordships are clearly of opinion that the family usage cannot exempt this zemindarí from the operation of the Regulation*, XI of 1793." This case seems to decide that in the Provinces of Bengal, Behar, and Orissa, *local usage* may, though *family usage* cannot, make a zemindarí impartible and descendible to a single heir in cases to which Bengal Regulation XI of 1793 is applicable. In the case of the *Tirhút Raj*,[1] their Lordships said: "We apprehend that the principle upon which we are about to proceed in this case admits of no doubt or question whatever. By the general law prevailing in this District (Tírhút), and indeed generally under the Hindú Law, estates are divisible amongst the sons when there are more than one son; they do not descend to the eldest son, but are divisible amongst all. With respect to a raj, as a principality, the general rule is otherwise,[2] and must be so. It is a sovereignty, a principality, a subordinate sovereignty and principality, no doubt; but still a limited sovereignty and principality, which, in its very nature, excludes the idea of division in the sense in which that term is issued in the present case. Again, there is no doubt that the general law with respect to inheritance, as well as with respect to other matters, may, *in the case of great families*, where it is shown that

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[1] *Ganesh Dutt Singh* v. *Maharájá Moheshur Singh and others*, VI Moo. Ind. Ap. 187.

[2] See Digest, Vol. II, pp. 123, 124.

usage has prevailed for a very long series of years, be controlled unless there be positive law to the contrary. Now, it is said in this case that there is no positive law which excludes the divisibility, unless it be clearly proved to be an ancient raj, which it is denied that it is. But Regulation XI of 1793 really has no bearing upon the case, *for the Regulation of* 1793 *is confined to cases in which there is no deed and no will executed*, while there is a deed, or where there is a will, it does not give a validity to that deed or that will which the deed or will would not otherwise possess, but leaves it precisely where it stood before; therefore the Regulation of 1793, and Regulation X of 1800, and the authorities upon this point which have been referred to, do not appear to their Lordships to be at all involved in the consideration of the present case." In this case there was a deed-of-gift by the late Rajá to his eldest son. The passage just quoted shows to what cases Regulation XI of 1793 is applicable. The decision did not turn on the point whether *family usage* can render a zemindarí impartible in cases to which the Regulation applies. It decided merely that a ráj in respect of which there is evidence of family usage of impartibility, is an exception to the general rule of Hindú law as to partibility. Whether this general proposition would be affected by Regulation XI of 1793 was not a question which arose, there being a deed-of-gift, and the Regulation being therefore inapplicable. Family usage through fourteen generations was here proved, and the custom founded thereon was held to be a good custom. In the *Hunsapore Case*[1] (*Babú Bírpertab Sahí* v. *Maharajah Rajendra Pertab Sahí*, IX W. R. P. C. 15) their Lordships spoke of Regulation XI of 1793 as "a general law, which confessedly does not affect the descent of large *zemindarís* held as *raj*, or subject to *kúlachár* or family custom." It may be observed, however, that in this case also there was a deed or will, the validity of which was held to have been proved. Should the exact point mooted above ever have to be decided, it may perhaps be held that Regulation XI of 1793 was merely intended to do away with the custom referred to in the preamble, *viz.*, *a custom originating under the Native administrations in considerations of financial convenience, and repugnant both to Hindú and Mohamedan laws;* and that it was not intended to interfere with any custom consonant with those laws, and having an origin wholly distinct from that here indicated. The case of the Nuddea Raj, which is another example of an impartible principality, was decided in 1792 before Regulation XI of 1793 was passed (Strange's Hindú Law, Vol. II, p. 447). It was said in the judgment in this case, that, by the 137th Article of the (old) Regulations, it is directed that, in cases of succession to *zemindarís*, the Judge do ascertain

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For this case before the Calcutta High Court, see W. R. Special No. p. 97.

whether they have been regulated by any general usage of the pergunnah, where the disputed land is situated, or by any particular usage of the family suing; and do consider in his decision the weight due to the evidence on this head." The following cases may well be referred to in connection with what has just been said:—*Anand Lal Singh Deo* v. *Maharaja Dheraj Garúd Narain Deo Bahadúr*, V Moo. Ind. Ap. 82;[1] *Kattama Nauchiar* v. *The Rájá of Shiva Gungah*, IX Moo. Ind. Ap. 539. "The zemindarí is admitted to be in the nature of a principality, impartible and capable of enjoyment by only one member of the family at a time. But whatever suggestions of a special custom of descent may heretofore have been made (and there are traces of such in the proceedings), the rule of succession to it is now admitted to be that of the general Hindú law prevalent in that part of India (district of Madura, Madras Presidency), with such qualifications only as flow from the impartible character of the subject":—the cases connected with the Tipperah *Raj*, *viz.*, *Ram Gangá Deo* v. *Dúrga Maní Jubaraj*, Ben. S. D. A. Rep. Vol. I, p. 270; *Bír Chandra Jubaraj* v. *Nilkrishna Takúr and others*, I W. R. Civ. Rul. 177, and *Nilkrishto Deb Barmano* v. *Bír Chandra Takúr* (Last case in appeal before the Privy Council), III B. L. R. P. C. 19, "Where a custom is proved to exist, it supersedes the general law, which, however, still regulates all beyond the custom":—*Rani Bistoprea Patmahadea* v. *Basúdeb Dul Bewartí Patnaik*, II W. R. Civ. Rul. 232 (*Keonghur Raj* in Cuttack—Sons by wife of a lower caste rank after sons of same caste with Raja):—*Nityanand Mardiraj* v. *Srikaran Juggernath Bewartah Patnaick*, III W. R. Civ. Rul. 116 (*Attgurh Raj in Cuttack*—Brother to be preferred to son by a slave girl):—*Rájá Nagendra Narain* v. *Raghunath Narain Deo*, Suth. Rep. Jan.—July, 1864, p. 20 (Fúlkúsunah, Maunbhoom):—*Login and another* v. *Princess Victoria Gauramma of Coorg*, I Jur. O. S. 109:—*Lalla Indernath Sahí Deyú* v. *Takúr Kasínath Sahí and others*, Ben. S. D. A. Rep. for 1845, p. 17:—*Maharaj Kowar Basdeo Singh* v. *Maharaja Rudar Singh Bahadur*, Ben. S. D. A. Rep. for 1846 p. 228:—*Raní Haro Sundarí Debya* v. *Raja Bissonath Singh*, Ben. S. D. A. Rep. for 1847, p. 339:—*Mútúvengada Chellasamy Manigar* v. *Túmbayasamy Manigar and others*, Mad. S. D. A. Rep. for 1849, p 27:—and *Jagannadharow* v. *Kandarow*, Mad. S. D. A. Rep. for 1849, p. 112:—*Maharaní Hiranath Koer* v. *Babú Ramnarain Singh*, IX B. L. R. 274.[2]

As to *family usage* unconnected with a *raj* or principality, the following cases may be consulted:—*Sarendra Nath Rai* v. *Hiramani Barmani*, XII Moo. In. Ap. 91, and I B. L. R. P. C. 32. "The pre-

[1] See also for this case, Ben. S. D. A. Rep., Vol. VI, p. 282.

[2] Decided while these pages are passing through the press. A number of cases will be found cited here.

valence in any part of India of a special course of descent in a family, differing from the ordinary course of descent in that place of the property of people of that class or race, stands on the footing of *usage or custom of the family*. It must have had a legal origin and have continuance (see *Abraham* v. *Abraham*),[1] and, whether the property be ancestral or self-acquired, the custom is capable of attaching and of being destroyed, equally as to both".—*Doe d. Jagomohan Rai* v. *Srímati Nímú Dasi*, Morton's Cases in Hindú Law by Montriou, p. 595: "I have no hesitation in saying that we are bound to take notice of any special customs which may exist among the Hindús or which can be considered as the law of any particular part of the country, but then there must be an averment in the pleadings to show that this custom prevails, and ought to be received as the law of that place, notwithstanding that it varies from the general laws of the Hindús. Mr. Ellis of the Madras Civil Service has shown that many customs and usages have been adopted from a former people by their Brahminical conquerors, and have become a part of the Hindú Code, although not in any degree founded on the Shastras. It may be said that, from the year 1756, to the year 1765, there was a double Government in this country, and during this period there was no registry of any Regulations. To those who minutely study the history of that period, it must be evident that many usages were then introduced that are now recognized as Hindú customs; and if any of the usages which were introduced at that period are relied upon as law, we are bound to take notice of them, should it be shown to us that they have become the written law of the land. But even if they have not become written law, and they are specially pleaded, we must still recognize them as a valid subsisting custom, on the presumption that this custom had its origin in some lawful authority, and there will be no more difficulty in doing this than there is in recognizing the local customs of England":[2]—*Gopal Sindh Mân Data Mahapater* v. *Narattan Sindh and others*, Ben. S. D. A. Rep. for 1845. p. 195:—*Rasick Lal Bhanj and others* v. *Purush Maní*, Ben. S. D. A Rep. for 1847, p. 205:—and *Samran Singh and others* v. *Khedan Singh and another*, Ben. S. D. A. Rep. for 1814, p. 116.

Local Custom of Preemption.

On the subject of a *local custom of preemption* amongst persons other than Mahomedans, the following cases may be consulted:—*Ram Dular Misser* v. *Jhamack Lal Misser*, VIII B. L. R. 455 (Hindús in Behar):—*Fakír Rayat and others* v. *Sheikh Imam Baksh* B. L. R. Sup. Vol. F. B. 35, and Sev. Aug.—Dec. 1863, p. 456 *a* (Hindus in Behar—custom presumed, unless contrary be shown, to be founded

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[1] IX Moo. Ind. Ap. 224.

[2] Per Grey, C.J. Here follows the passage already quoted, *ante*, p. 88, at foot.

on and co-extensive with Mahomedan law) :—*Kantiram and another* v. *Walí Sahú*, II B. L. R. Civ. Rul. 330 (Hindús in Purnea) :—*Babú Maheshi Lal* v. *G. Christian and others*, VI W. R. Civ. Rul. 250 (Christians in Bhaugulpore) :—*Sheraj Alì Chaudhrí* v. *Ramzan Bibí and others*, VIII W. R. Civ. Rul. 204 (Hindú defendant not bound by Mahomedan law, unless there be proof of custom) :—*Munshí Habíbal Hosen* v. *Lalla Deokí Nandan*, Suth. Rep. Jan.—July, 1864, p. 74 (To the same effect—24-Pergunnahs) :—*Dewan Munwar Alí* v. *Syud Azharudín Mahomed and another*, V W. R. Civ. Rul. 270 (To the same effect—Tipperah) :—*Nasírudín Khan* v. *Indra Narain Chaudhrí* V W. R. Civ. Rul. 287 (Hindús in Chittagong) : *Indra Narain Chaudhrí* v. *Mahomed Nazírudín* and others, I W. R. Civ. Rul. 234 (Hindús in Chittagong) :—*Madhab Chandra Nath Bishwas* v. *Tamí Bewah and others*, V W. R. Civ. Rul. 279 (Hindús in Jessore) :—*Jamílah Khatun and others* v. *Pagal Ram and others*, I W. R. Civ. Rul. 251 (Between Mahomedans and Hindús in Sylhet) :—*Benarsí Das and others* v. *Phúl Chand*, I N-W-P. Rep. Civ. Ap. 243 (A solitary case or two not sufficient proof) :—and see Appendix II, *post*.

Other Local Customs.

For other *local* customs, see the following cases :—*Baní Madhab Banerjí* v. *Jai Krishna Mukerjí*, VII B. L. R. 152 (Tenures transferable) :—*Mussamat Kastúra Kúmarí* v. *Monohur Deo and others*, Suth. Jan—July, 1864, p. 39 (Custom of succession to *Ghâtwalí* tenures) :—*Har Lal Singh* v. *Juráwan Singh*, Ben. S. D. A. Rep. for 1837, p. 169 (The same) :—*Ganesh Gír* v. *Omrao Gír*, Ben. S. D. A. Rep. for 1807, p. 218 (Succession to a Mohant) :—*Ganga Das and others* v. *Telak Das*, Ben. S. D. A. Rep. for 1810, p. 309 (The same) :—*Gobinda Das* v. *Ram Sahaí Jamadar and others*, I Fulton's Rep. 217 (Beiragís) :—In the goods of *Sita Ram, deceased*, see Vyavastha Darpana, by Babú Shama Churn Sírkár, p. 330 (Beiragís) :—*Narain Das* v. *Bindaban Das*, Ben. S. D. A. Rep. for 1815, p. 151 (Mohants).

As to *Custom*, see also *ante*, pp. 87, 88.

As to Religious or Charitable foundations, see Bengal Regulation XIX of 1810 ; Madras Regulation VII of 1817 ; Act XX of 1863 ; and Act VII (Bom. C.) of 1865.

The portion of the Section which relates to the *meaning of words or terms* is particularly valuable in a country like India, in which there are so many different languages, and in which justice is largely administered by Englishmen. A Judge may also consult a dictionary as to the meaning of a word. See Tay. § 20; Gresley on Evidence, 295. See also the penultimate para. of Section 57, *post*, and the first *proviso* to Section 60.]

Opinion on relationship when relevant.

50. When the Court has to form an opinion as to the relationship of one person to another, the opinion, expressed by conduct, as to the existence of such relationship, of any person who, as a member of the family or otherwise, has special means of knowledge on the subject, is a relevant fact: Provided that such opinion shall not be sufficient to prove a marriage in proceedings under the Indian Divorce Act, or in prosecutions under section four hundred and ninety-four, four hundred and ninety-five, four hundred and ninety-seven, or four hundred and ninety-eight of the Indian Penal Code.

Illustrations.

(*a.*) The question is, whether A and B were married. The fact that they were usually received and treated by their friends as husband and wife, is relevant.

(*b.*) The question is whether A was the legitimate son of B. The fact that A was always treated as such by members of the family, is relevant.

[The provisions of this Section are in consonance with English law. See Tay. § 517, 584, and the cases there cited. See also Section 8, *ante*, p. 80: and the observations as to family conduct at p. 134, *ante*.

The presumption of Mahomedan law is so strong in favor of legitimacy that very little evidence of a child being treated as a legitimate child will suffice to prove legitimacy. The following cases may be consulted, *viz.*:—*Khajah Hidayatúla* v. *Rai Jan Khanum*, III Moo. Ind. Ap, 295; *Mahomed Bakhir Hosen Khan Bahadur* v. *Sharafunissa Begum*, VIII Moo. Ind. Ap. 136; *Mussamat Nawabunissa and others* v. *Mussamat Fazlúnissa*, Marsh. Rep. 428; *Ashrofunissa* v. *Mussamat Azíman*, I W. R. Civ. Rul. 17; *Rani Roshan Jahan* v. *Raja Syud Enayat Hosen*, V W. R. Civ. Rul. 4; *Jeswat Singhji* v. *Jet Singhji*, III Moo. Ind. Ap. 150.]

Grounds of opinion when relevant.

51. Whenever the opinion of any living person is relevant, the grounds on which such opinion is based are also relevant.

Illustration.

An expert may give an account of experiments performed by him for the purpose of forming his opinion.

[The correctness of the opinion or otherwise can the better be estimated in many instances when the grounds upon which it is based are known. In *Stephenson* v. *The River Tyne Commissioners* (17 Weekly Reporter, 590) it was held that a skilled witness may not only say that he formed an opinion, but that he *acted on that opinion*, his acting thereon being a strong corroboration of the truth of the opinion. What a person does is usually better evidence of his opinion than what he says. This evidence would doubtless be admissible under Section 8, *ante*, p. 80; or under Section 11, *ante*, p. 85.]

CHARACTER WHEN RELEVANT.

In civil cases, character to prove conduct imputed irrelevant.

52. In civil cases, the fact that the character of any person concerned is such as to render probable or improbable any conduct imputed to him, is irrelevant, except in so far as such character appears from facts otherwise relevant.

["As evidence of general character can, at best, afford only a glimmering light, when the question is whether the party has done a certain act or not, its admission for such a purpose is exclusively confined to criminal proceedings, in which it was originally received *in favorem vitæ*.[1] ..... A distinction has, however, been taken between cases where particular acts of misconduct are imputed to a party, and those where his *general conduct is put in issue:* and though evidence of character is rejected in the former, it has several times been admitted in the latter class of cases. Thus, in an action for a libel contained in an answer to inquiries respecting the character of a governess, where the language complained of stated that the defendant parted with the plaintiff "on account of her incompetency, and her not being lady-like or good-tempered," general evidence was given of her competency, good-temper, and manners, by witnesses who were her personal friends; and, on the same principle, where, in a similar action, the words charged the plaintiff generally with dishonesty and misconduct while in service, a witness with whom she had formerly lived was allowed to testify to her antecedent good conduct."[2] "Let a man think,"

[1] "In favor of life."
[2] Tay. §§ 328, 329.

says Blair, "what multitudes of those among whom he dwells are totally ignorant of his name and character; how many imagine themselves too much occupied with their own wants and pursuits to pay him the least attention." And even among those intimate relations, who know a man the best, how very few are really acquainted with his inner mind and disposition. It is, therefore, truly but a glimmering light that can be thrown by such evidence upon the probability or improbability of a man's having done a particular act.[1]]

In criminal cases, previous good character relevant.

53. In criminal proceedings, the fact that the person accused is of a good character, is relevant.

[Evidence of good character for the defence may be given either by cross-examining the witnesses for the prosecution, or by calling witnesses on behalf of the accused. As to these latter, see Section 140, *post*. The above Section is in conformity with English law. "Though general evidence of bad character," says Mr. Stephen, "is not admitted against the prisoner, general evidence of good character is always admitted in his favor. This would, no doubt, be an inconsistency justifiable, or at least intelligible on the ground of the humanity of English law, if such evidence were not often of great importance as tending to *explain conduct*. A loses his watch; B is found in possession of it next day, and says he found it, and was keeping it for the owner. If A and B are strangers, and if B can call no one to speak to his character, this is a very poor excuse; but if B is a friend of A's, and of the same position in life, and if he calls many respectable people, who have known him from childhood, and say he is a perfectly honest man, the story becomes highly improbable. If the same thing happened to a thoroughly respectable, well-established inhabitant of the town, say, for instance, to the Rector of the parish, being a man of first-rate character and large fortune, no one would think twice of it. These illustrations give the true theory of evidence of character. Judges frequently tell juries that evidence of character cannot be of use where the case is clearly proved except in mitigation (or, possibly, aggravation) of punishment; but that, if they have any doubt,[2] evidence of character is highly important. This always seems to me to be equivalent to saying, "If you think the prisoner guilty, say so; and if you think you ought to acquit him inde-

[1] Clause 2 of Section 11 would have admitted this evidence in civil cases but for the excluding provisions of Section 52.

[2] "When the point at issue is whether the accused has committed a particular criminal act, evidence of his general good character is obviously entitled to little weight, unless some reasonable doubt exists as to his guilt; and, therefore, in this event alone will the jury be advised to act upon such evidence." Tay. § 826.

pendently of the evidence of character, acquit him rather the more readily because of it." Evidence of character would thus be superfluous in every case. *The true distinction is that evidence of character may explain conduct, but cannot alter facts.*"[1] Where the act done is in itself indifferent, or in other words where the act amounts to an offence only by reason of being done with a *vicious intention*, evidence of character is valuable as to the probability or otherwise of the existence of such an intention. Where, on the other hand, the intention is of the essence of the act, such evidence may be of use, only if it be doubtful whether the prisoner was the person who committed the act. Where there can be no doubt on this point, it goes only to show that the witnesses did not know the real character of the man, or that, contrary to the usual course of his life (the result, it may be of nature; it may be of self-training) he was tempted into or surprised in a fault, which happened to be an offence punishable by the criminal law.]

Previous conviction in criminal trials relevant, but not previous bad character, except in reply.

54. In criminal proceedings, the fact that the accused person has been previously convicted of any offence is relevant; but the fact that he has a bad character is irrelevant, unless evidence has been given that he has a good character, in which case it becomes relevant.

Explanation.—This section does not apply to cases in which the bad character of any person is itself a fact in issue.

[The rule, well-established under English law, that general evidence of bad character cannot in the first instance be given for the prosecution and against a prisoner, has been followed in India (*The Queen* v. *Behari Dosádh and others*, VII W. R. Crim. Rul. 7; *The Queen* v. *Gopal Tákur*, VI W. R. Crim. Rul. 72; *The Queen* v. *Phúlchand and another*, VIII W. R. Crim. Rul. 11). "A man's general bad character," says Mr. Stephen, "is a weak reason for believing that he was concerned in any particular criminal transaction, for it is a circumstance common to him and hundreds and thousands of other people; whereas the opportunity of committing the crime and facts immediately connected with it are marks which belong to very few, perhaps only to one or two persons. If general bad character is too remote, *a fortiori* the particular transactions of which that general bad character is the effect are still further removed from proof; accordingly it is an inflexible

[1] *General View of the Criminal Law of England*, pp. 311, 312.

rule of English criminal law to exclude evidence of such transactions."[1] When, however, with a view of raising a presumption of innocence, witnesses to good character are called for the defence, the prosecution may rebut this presumption *either* by cross-examining these witnesses (Section 140, *post*) as to particular facts or as to the grounds of their belief *or* by calling separate witnesses of bad character. The latter course is, in practice, seldom resorted to in England, and on one occasion such evidence was rejected.[2] The Act as originally drafted contained the following additional Section dealing with the subject of character:—

Character for chastity in trials for rape.

"In trials for rape, or attempts to commit rape, the fact that the woman on whom the alleged offence was committed is a common prostitute, or that her conduct was generally unchaste, is relevant."

It was, however, thought unnecessary to retain this as a separate Section, and it was accordingly incorporated with Section 155, *post*. See clause 4 thereof.

Previous Conviction always relevant.

"*In criminal proceedings the fact that the accused person has been previously convicted of any offence is relevant*"—this is an innovation not in accordance with English law, under which such evidence can be given only in reply to evidence of good character offered for the defence, and cannot be given in the first instance as part of the prosecution.[3] The effect of this new provision will be that, for whatever criminal offence a person is on his trial, a previous conviction for any other offence, however dissimilar in character, may be offered as evidence against him. The value of such evidence will vary greatly. The probability of a man's having committed a *forgery* cannot be much increased by showing that he was previously convicted for *rape* or *assault*. The truth of a charge of *coining* will not be rendered more likely by evidence of a conviction for *adultery*:[4] nor will proof of a conviction for selling goods with a *counterfeit trade-mark* be of much use when the prisoner is being tried for *kidnapping*. Where, however, both offences are of the same class or denomination, it is impossible not to say that this evidence will be in many cases most useful. If one man's hand be found in another man's pocket, the allegation of an innocent motive may safely be contradicted by evidence of a few previous convictions for *picking pockets*. As to the mode of proving previous convictions, see *ante*, p. 217.

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[1] *General View of the Criminal Law of England*, pp 309—310.

[2] *Reg.* v. *Burt*, 5 Cox's Criminal Cases, 284.

[3] To the general Rule of English law above stated there is a recent exception, 32 & 33 Vict. ("The Habitual Criminals Act"), Cap. 99, Sec. 11, which allows such evidence to prove guilty knowledge in cases of receiving stolen goods.

[4] Under the *Indian* Penal Code, this is a criminal offence.

From the above provision, which admits previous convictions as evidence in all criminal cases, must be distinguished the following clause of Section 439 of the Code of Criminal Procedure, Act X of 1872:—

"If the accused person has been previously convicted of any offence, and if it is intended to prove such previous conviction *for the purpose of affecting the punishment* which is to be awarded, the fact of the previous conviction must be stated in the charge. If it is omitted, it may be added at any time before sentence is passed, but not afterwards."

Previous conviction to be set out in charge.

This should be read in connection with Section 75 of the Indian Penal Code, which enacts that "Whoever, having been convicted of an offence punishable under Chapter XII or Chapter XVII of this Code with imprisonment of either description for a term of three years or upwards, shall be guilty of any offence punishable under either of those Chapters with imprisonment of either description for a term of three years or upwards, shall be subject for every such subsequent offence to transportation for life or to double the amount of punishment to which he would otherwise have been liable for the same; provided that he shall not in any case be liable to imprisonment for a term exceeding ten years"—and in connection with Sections 3 and 4 of the Whipping Act, VI of 1864, which provide for the punishment of whipping *in lieu of* or *in addition to* other punishment on the occasion of a second-conviction for one of certain specified offences.

In connection with Courts-Martial, to which the Evidence Act is applicable (Section 1), see Article 117, Act V of 1869.

The *Explanation* may be read in connection with Chapter XXXVIII (Sections 504—517) of the Code of Criminal Procedure, Act X of 1872; under which persons of known bad or dangerous character in the Mofussil may be called upon to give security for good behaviour, and, in default thereof, may be imprisoned.]

55. In civil cases, the fact that the character of any person is such as to affect the amount of damages which he ought to receive, is relevant.

Character as affecting damages.

Explanation.—In sections fifty-two, fifty-three, fifty-four, and fifty-five, the word 'character' includes both reputation and disposition; but evidence may be given only of general reputation and general disposition and not of particular acts by which reputation or disposition were shown.

[Where a husband sues for damages on the ground of adultery. or a father on the ground of seduction, compensation is in reality sought for the pain which the defendant has caused the plaintiff to suffer by disgracing the latter's family and ruining his domestic happiness. The damages should, therefore, be commensurate with this pain, which must vary according as the character of wife or daughter had been previously unblemished or otherwise. In such cases, under English law, evidence not only of *general* bad character, but also of *particular* acts of immorality is admissible. The above Section would, however, appear not to comtemplate cases of this kind, inasmuch as the person whose character is in question is therein assumed to be the same as the person who claims damages. This evidence may, however, be admissible under Section 12, *ante*, p. 86. The same remark applies to evidence called by the defendant in an action by a husband for damages for alleged adultery with his wife to show that the husband had neglected his wife, turned her out of doors, refused to maintain her, had himself been guilty of dissolute conduct, &c.

Some cases under English Law.

The following are some of the questions which have been raised in England on the principle with which the Section now under discussion is concerned. There has been considerable doubt whether, in an action for defamation, evidence would be admitted to impeach the plaintiff's previous general character, and to show that, at the time of the publication, he laboured under a general suspicion of having been guilty of the charge imputed to him by the defendant. Mr. Taylor discussed the question in the fourth edition of his work (§ 333), and arrived at the conclusion that the weight of authority inclines slightly in favour of the admissibility of this evidence, even though the defendant has pleaded truth as a justification and has failed in establishing his plea.[1] He points out that the arguments against admissibility mainly turn upon proving *particular acts of misconduct*, and that they have little force where evidence is offered merely of *general reputation*. The above Section of the Indian Evidence Act is in accordance with this view. In actions for breach of promise of marriage it has never been doubted but that the defendant may show, in mitigation of damages, that the plaintiff is a person of bad character. In an action for damages for malicious prosecution, Lord Kenyon allowed a witness to be asked, with a view of showing probable cause, whether the plaintiff was not a man of notoriously bad character. The effect of numerous other cases is that such evidence is inadmissible. Lord Kenyon's view has been adopted in the Indian Evidence Act. In an action for defamation, it has always

[1] But see *Thompson* v. *Nye*, 16 Adolphus and Ellis' Rep. 175.

been held that a plaintiff cannot in the first instance give general evidence of good character in aggravation of damage, the presumption of law being already in his favour: but he may give such evidence to rebut evidence of the contrary offered by the defendant. It may be doubtful if this rule will be affected by the above Section.

With reference to the *Explanation*, 'reputation' signifies what is thought of a person by others, and is constituted by public opininion.[1] 'Disposition' comprehends the springs and motives of actions, is permanent and settled, and respects the whole frame and texture of the mind.[2] Both reputation and disposition lie in the general habit of the man rather than in particular acts or manifestations. *Evidence may be given only of general reputation and general disposition.* The proper form of question to the witness is—"From your knowledge of the plaintiff or prisoner," as it may be, "does he bear a good character for honesty, &c.?" "From your knowledge of his general character, do you think, &c.?"

Here ends that portion of the Act, which is concerned with the *Relevancy* of *Facts*. The Draft Bill prepared by the Commissioners (see *ante*, p. 16) contained the following Section:—"When any fact is herein declared to be relevant, it is not intended to indicate in any way the weight, if any, which the Court shall attach to it, this being a matter solely for the discretion of the Court." It was not thought necessary to retain this express provision in the new Act, but the principle involved therein should none the less be borne in mind. The question of the admissibility of evidence is wholly distinct from the weight, which is to be assigned to it, when admitted.

Weight of Evidence distinct from Admissibility.

English text-writers treat of the principles which govern the production of evidence as arranged under the four following rules, *viz.*—

1*st*,—The evidence must correspond with the allegations, but it will be sufficient if the substance of the issues be proved.

2*nd*,—The evidence must be confined to the points in issue.

3*rd*,—The burden of proof lies on the party holding the substantial affirmative.

4*th*,—The best evidence must be given.

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[1] See *Crabb's Synonymes:* "It is possible for a man to have a fair *reputation* who has not in reality a good *character;* although men of really good *character* are not likely to have a bad *reputation.*"

[2] "*Disposition* respects the whole frame and texture of the mind; *temper* respects only the bias or tone of the feelings. *Disposition* is permanent and settled; *temper* may be transitory and fluctuating. The *disposition* comprehends the springs and motives of actions; the *temper* influences the action of the moment. It is possible and not unfrequent to have a good *disposition* with a bad *temper*, and *vice versa.*"—*Idem.*

Decision must be *secundum allegata et probata.*

The *second* of these rules corresponds with Part I of the Act, which treats of the *Relevancy* of *Facts.* The *third* will be found comprised in the provisions of Chapter VII, Part III, *post.* The *fourth* forms the substance of Chapters IV and V, Part II, *post.* The *first* has, however, not been incorporated with the Act, no doubt because its framers considered this to be a rule of *Procedure* rather than of *Evidence.* As, however, most writers on the subject of *Evidence* give this rule a place in their treatises, it will not be inconsistent with the design of this work to say a few words as to its meaning and application, more especially as the neglect of this particular rule in India has on more than one occasion formed the subject of comment by the highest Courts of Appeal. Mr. Taylor, speaking with reference to the state of things in England, says as follows:—"The pleadings, at Common Law, are composed of the written allegations of the parties, terminating in propositions distinctly affirmed on one side, and denied on the other, called the *issues.* If these are propositions of fact, they must, as a general rule, be tried by the jury, and the first rule which it is important to remember is the above.[1] As one of the main objects of pleading is to apprise the parties of the specific nature of the question to be tried, and as this object would be defeated if either party were at liberty *to prove facts essentially different from those which he has stated on the record, as constituting his claim or charge on the one hand or his defence on the other,* the necessity of establishing such a general rule as the present becomes apparent, and the only remaining question concerns its limitation and extent." There is some similarity between the present rule and that as to relevancy or the evidence being confined to the points in issue. The one disallows the admission of evidence not bearing on the ascertained question in dispute; the other, looking to the ultimate decision of the case, says to the plaintiff or defendant—"You can succeed only on proving what you have directly alleged. You may have a good ground of action or defence other than that which you have put forward on the record, but the present case can be tried and decided only on proof or disproof of the particular facts which you have yourself alleged as a ground of relief."

"It is not only necessary," says Mr. Macpherson, "that the substance of the case set up by a party should be proved; it must be essentially the same case, and not a different case: for the Court will not allow a man to be taken by surprise by a case proved on the other side, which, though plausible in itself, is different from that which was set up.

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[1] *I. e.* "The evidence must correspond with the allegations, but the substance only of the issues need be proved.."

There must be a direct and real conformity, though not perhaps a minute literal conformity between the proofs and the allegations: parties who come for the execution of agreements must state them as they ought to be stated, and not set up titles which they cannot support. Thus a party should not set up a general title, such as inheritance, and then the seek to recover under a particular deed merely..... .....When a man advances one set of claims and establishes another, Judges are very often tempted to take irregular courses for the purpose of saving further litigation. But it is reasonable and just that the rights of parties litigating should be decided *secundum allegata et probata* (according to what is averred and proved); and it has been well observed, that attempts to reach the supposed equity of each case by departing from the rules which have been established for the purpose of maintaining and administering justice, generally lead in the particular cases to results which were never contemplated, and introduce disorder, uncertainty, and confusion into the general practice of the Court."[1]

In the case of *Srimati Dasi* v. *Rani Lalan Mani* (XII Moo. Ind. Ap. 475), the members of the Privy Council said: "Their Lordships cannot but feel that it would be most mischievous to permit parties who had had their case, upon one view of it, fairly tried, to come before this Board, and to seek to have the appeal determined upon grounds which have never been considered, or taken, or tried in the Court below." In the case of *Eshan Chandra Singh* v. *Shamachurn Bhatta* (XI Moo. Ind. Ap. 21), the following observations were made: "This case is one of considerable importance, and their Lordships desire to take advantage of it for the purpose of pointing out the absolute necessity that the determinations in a cause should be founded *upon a case either to be found in the pleadings or involved in or consistent with the case thereby made*. Unfortunately in the present instance the decision of the High Court appears to be founded upon an assumed state of facts which is contradictory to the case stated in the plaint by the plaintiff, and devoid not only of allegation, but also of evidence in support of it. The case made by the plaintiff alleges a distinct agreement between the plaintiff and two brothers—Koilass and Eshan—that the three should be joint purchasers and joint owners—owners in common, at all events—of a certain lease, which was put up by a zemindar to be taken by public tender at a particular time. The plaint proceeds upon the allegation that that lease was taken by *Koilass* on his own behalf and on behalf of *Eshan* and on behalf of the plaintiff, and that, in conformity with the agreement between the three. *Koilass* subsequently executed an instrument for the purpose of giving

[1] *Civil Procedure*, 4th Edition, pp. 219--220.

effect to the agreement. The allegations, therefore, in the plaint are inconsistent with the hypothesis of *Koilass* having no interest and acting in the transaction as agent only of Eshan. The plaint also proceeds upon a clear and well-defined ground of relief, namely, contract and agreement between the parties interested. The decision proceeds upon what is set forth as an equity resulting from the relation between *Koilass* and *Eshan* of principal and agent, and from the alleged fact of Koilass in the execution of his authority, having given certain rights and interests to the plaintiff without which his principal (Eshan) would not have been able to obtain the property in question. But the difference between the two grounds of relief and between the two kinds of cases is plain..... These facts being established by the judgment, and being, therefore, binding upon the High Court, which is not a Court at liberty to collect facts anew, it is very much to be regretted that the High Court should have departed altogether from the case made by the plaint, and should have founded their conclusion upon an assumed case wholly inconsistent with the recorded findings contained in the original judgment.....It is impossible to conclude parties by inferences of fact which are not only not consistent with the allegations that are to be found in the plaint, which constitute the case the defendant has to meet, but which are in reality contradictory of the case made by the plaintiff. It will introduce the greatest amount of uncertainty into judicial proceedings if the final determination of causes is to be founded upon inferences at variance with the case that the plaintiff has pleaded, and, by joining issue in the cause, has undertaken to prove.....Their Lordships.....desire to have the rule observed, that the state of facts, and the equities and ground of relief originally alleged and pleaded by the plaintiff, shall not be departed from." In the case of *Mahammed Zahúr Ali Khan* v. *Mussamat Tahuráni Rutta Koer* (XI Moo. Ind. Ap. 473), the following observations were made:—"Though this Committee is always disposed to give a liberal construction to pleadings in the Indian Courts, so as to allow every question fairly arising on the case made by the pleadings to be raised and discussed in the suit, yet this liberality of construction must have some limit. A plaintiff cannot be entitled to relief upon facts or documents not stated or referred to by him in his pleadings." In *S. M. Nistarini Dasi* v. *Makhan Lal Dutt* (IX B. L. R. 29), Couch, C. J., remarked that the principles enunciated in the judgments in the last two cases are wholly in accordance with the rule observed in Courts of equity—that if the plaintiff should mistake the relief to which he is entitled in his special prayer, the Court may yet afford him the relief to which he has a right under the prayer for general relief, provided it is such relief as is agreeable to the case made by the plaint." See

also *W. R. Arbuthnot and others* v. *C. D. Betts and others* (VI B. L. R. 270)—"The Judge, I think, was wrong in saying that he was bound to try the suit in the manner in which the plaintiffs framed their plaint. The object of the plaint is to bring the matter in dispute between the parties before the Court; but, upon the settlement of issues, the Judge is to ascertain what is the real question to be tried: and at the hearing, if he can, either upon the issues already framed or upon amended issues, determine that question, he ought to do so. .....I think that the Procedure Code does not prescribe or even encourage parties to do anything more than state broadly and simply the facts upon which they rely and the relief which they ask for. The Procedure Code, it appears to me, does not limit the parties to particular forms of action; and, provided that the facts upon which the plaintiffs rely are fully disclosed in the plaint and written statement, it rests entirely upon the Court to attach the legal consequences to those facts, and award to the plaintiffs the relief to which those facts entitle them." The facts may not be sufficiently stated in the plaint, in which case it is the duty of the Court, when fixing the issues, to elicit all that is necessary to raise the real questions in dispute between the parties; or the plaintiff, while setting out the real facts, may not exactly conceive or ask for the particular remedy, which is available upon those facts, in which case the Court should not deny him any remedy at all, because he has not specially asked the remedy which he can have. But either of those cases is very different from setting up in a later stage of the proceedings a wholly different state of facts, and from doing what is really shifting the cause of action. In the language of their Lordships of the Privy Council, *the state of facts and the equities and ground of relief originally alleged and pleaded must not be departed from.* This principle may well be illustrated by a few examples. A Hindú sued to set aside a certain alienation on the ground that the alienor was an illegitimate son of the plaintiff's grandfather and therefore had no interest in the property. Failing to substantiate this ground in the first Court, he contended in appeal that the alienation was bad, because, under the Mitakshara law, the owner of a share in a joint ancestral estate is not competent to alienate his share without the consent of the other heirs. It was held that he could not be allowed to shift his ground in this manner (*Srí Persad* v. *Raj Gúrú Triambaknath Deo and others*, VI B. L. R. 555). See also *Sheo Das Narain Singh*, v. *Bhagwan Dutt and others*, II B. L. R. App. 15; *Kalí Mohan Chattapadya* v. *Kalí Krishna Rai Chaudhrí*, II B L. R. App. 39 (Here the new point taken manifestly arose out of the facts alleged):—*Uma Sundarí Dasí* v. *Dwarkanath Rai*, II B. L. R. 288; *Jagobandhú Deb* v. *Goluk Chandra Haldar*, X W. R. 228; *Hira Lal Malík* v. *Matilal Malík*, V B. L. R. 682; *Verasvamí Gramuní* v. *Ayyasvami*

Graminí I Mad. Rep. 471; *Laljí Rattanjí* v. *Gangaram Bin Tuljaram*, II Bom. Rep. 184; *Madhú Sudhan Goswami* v. *Hills*, X W. R. 242.

Where a plaintiff had sued for rent relying on a kabuliyat or counterpart of a lease, the execution of which was denied, it was held that on failing to prove this document he was not entitled to succeed. A Full Bench of the Calcutta High Court concurred in the following observations:—"We are of opinion that the plaintiff was not entitled to recover. *It is a general rule that a plaintiff must prove his case as laid in his plaint or written statement.* If there is a variance between his statement and his proofs arising from inadvertence or mistake, the Court may allow the issues to be amended, but that is entirely at the discretion of the Court..... ..... The plaintiff having failed in proving his case as originally stated is not entitled to succeed; and in this case there are no sufficient grounds for allowing an amendment." (*Nara Harí Mahant* v. *Nárayaní Dásí*, W. R. Special Number 23). See also *Sheikh Titú* v. *Sheikh Bitan*, Marsh. Rep. 47; *Simrú Karígar* v. *Anand Chandra Rai*, Marsh. Rep. 57; *Bisji Bibí* v. *Monohur Das*, II Jur. N. S. 118; *Gúrú Dass* v. *Srishti Dhur Dey*, I R. J. and P. J. 200; *also Umesh Chandra Biswas* v. *Nilkamal Bandopadya*, id. 356.

The rule under consideration was, under the old rules of pleading in England, applied with such *pedantic* strictness as to occasion both in civil and criminal cases great failures of justice, the least variance even in matters not directly bearing on the issue having been held fatal. But the Legislature interfered and laid down rules of broad justice, which have been universally approved, and the spirit of which has been followed in the preparation of the Indian Codes. *The power of amendment* conferred on the Judges was one of the principal means used for the acquirement of this desirable end. The following is the provision of the Civil Code of Procedure on this subject (Section 141):—

Power of Amendment.

"At any time before the decision of the case, the Court may amend the issues or frame additional issues on such terms as to it shall seem fit, and all such amendments as may be necessary for the purpose of determining *the real question or controversy between the parties* shall be so made."

In the case of *Govind Máhápátur and others* v. *Mádhub Persád Pundit* (VI W. R. Civ. Rul. 211) the scope of this Section was discussed by the Calcutta High Court, and it was said that the "power of a Court to amend a plaint extends by a *vivâ voce* examination to the elucidation of what is ambiguous, to the amendment of what is erroneous, and to the supplying of what is defective; but not to the conversion of a suit of one character into another, inconsistent with and opposed to the remedy at first asked for."

In the case of *Sheikh Mahomed Ríza ú-dín* v. *Hosein Baksh Khán*, (I W. R. Civ. Rul. 300), the plaintiff, alleging a contract of partnership, which he failed to prove, sought to recover some 3,000 rupees from the defendant. The latter admitted the receipt of money from the plaintiff as a deposit re-payable by him, and on this admission the plaintiff was declared entitled to a decree for the balance of the advance still due to him. *Mr. Justice Campbell* remarked as follows:—"I am decidedly of opinion that the object of the new Procedure being to do away with strict rules of pleading and technicalities of all kinds, it is not necessary to keep parties very strictly to their written pleas further than the interests of broad justice and morality require; and that it is right that the Judge should simply find the real questions upon which the parties are at issue, and try those questions. Here it was admitted on both sides, that money of the plaintiff's had been received by the defendant, and was re-payable to him upon an account. The question between the parties was, whether defendant had agreed to share the profits of his business with plaintiff, and to pay those profits in addition to the money received. I think it is unfair and unnecessary that, because plaintiff has essayed to prove something more than the money count, and has failed to prove that additional claim, he should, therefore, also lose the money which is clearly due to him, or that the parties should be subjected to further unnecessary litigation. Defendant did not in his answer admit anything to be due to the plaintiff, but denied the claim in general terms; and as, on his own version of the contract, a certain sum has been found to be due, I think that the Judge was wrong in refusing to decree that sum in his favor."

Mr. Justice Morgan said:—"I think the plaintiff should obtain in the present suit a decree for the balance shown by the books, and that this decree will be in due conformity with the previous allegations and the proofs The verified plaint required by the Procedure Code does not preclude the Court from framing an issue, and pronouncing a decree respecting any matter *fairly within the scope of the plaint, which the written statements or the oral examinations may show to be a part of* the real question in controversy between the parties. In a suit for one cause of action, a totally unconnected transaction should certainly not be investigated, because the suit is brought to determine not *all* or *any* matters in difference between the parties, but *a certain particular controversy*. There is, perhaps, no substantial difference of opinion as to this rule, but only as to its application to the present case. I cannot regard the balance now ascertained to be due as an unconnected transaction wholly distinct from any cause of action contained in the plaint, and I, therefore, agree with Mr. Justice Campbell that the plaintiff is entitled to recover it in this suit. Our Code does not contemplate that the plaint shall contain several '*counts*,' giving various versions of the contract

or title, upon which the plaintiff sues, and, if we are to hold a plaintiff strictly to the proof of the case alleged in the plaint, and to punish any variance between the contract proved and the contract alleged, by dismissal of the suit, we shall, in my opinion, inflict great hardship on suitors, and sometimes punish them for the errors, and perhaps the unavoidable errors, of their advisers." The following cases may also be usefully consulted on the subject of *amendment, viz.:— W. R. Arbuthnot* v. *C. D. Betts*, VI B. L. R. 274; *The Delhi and London Bank* v. *Miller*, VII B. L. R. App. 65; *Railú Mul* v. *Nanak*, I N-W-P. Rep. 171; *East India Railway Company* v. *Jordan and others*, XIV W. R. 11.

The Code of Criminal Procedure, Act X of 1872, contains similar provisions. Section 444 is as follows:—"Any accused person may apply to the Court by which he is tried for an amendment of the charge made against him; and in considering whether any error in a charge did in fact mislead the accused person, the Court shall take into account the fact that he did or did not make such an application." Section 445 empowers any Court, either upon the application of the accused person, or upon its own motion, *to amend or alter any charge at any stage of the proceedings* before judgment is signed, or, in cases of trials before a Court of Session, before the verdict of the jury is delivered or the opinion of the assessors is expressed. Such amendment shall be read and explained to the accused person. Section 447 enacts that, if the amendment or alteration is such that proceeding immediately with the trial is not likely, in the opinion of the Court, to prejudice the accused person in his defence, it shall be at the discretion of the Court, after making such amendment or alteration, to proceed with the trial as if the amended charge had been the original charge. Section 448 enacts that if the amendment or alteration is such that proceeding immediately with the trial is likely, in the opinion of the Court, to prejudice the accused person in his defence, the Court may either direct a new trial, or suspend the trial for such period as may be necessary to enable the accused person to make his defence to the amended or altered charge, and, after hearing his defence, the Court may further adjourn the trial, to admit of the appearance of any witness, whose evidence the Court may consider to be material to the case, or whom the accused person may wish to be summoned in his defence.

Prisoner may apply for amendment.

Section 449 provides that in all cases of amendment or alteration of a charge, the prosecutor and accused person shall be allowed to recall and examine any witness who may have been examined.

Prosecutor and accused person may recall witnesses.

Section 450 further provides that, if the offence stated in the new charge be one for which previous sanction is necessary, the case shall not be proceeded with until such sanction is obtained; unless sanction has been already obtained for a prosecution on the same facts as those on which the new charge was based.

Previous sanction to be obtained if offence in new charge require it.

Finally, Section 451 enacts that, if any Appellate Court, or the High Court in the exercise of its powers of revision is of opinion that any person, convicted of an offence, was in fact misled in his defence by an error in the charge, it shall direct a new trial to be had upon a charge amended in whatever manner it thinks proper.

Effect of material error.

In connection with the rule itself there are one or two other points which may be noticed. And first, *surplusage need not be proved.* The term "surplusage" is used to signify whatever may be struck out of the record without destroying the right of action, or the charge on the one hand or the defence on the other. For example, in an action on a breach of a warranty that some claret was in a fit state to be exported to India, whereas it was at the time, and *the defendant well knew that it was*, in a very unfit state, it was held unnecessary to prove the words in italics, as the cause of action was complete, if the claret was really unfit for exportation, whether the defendant was aware of the unfitness or not. *Lord Ellenborough* said:—"If the whole averment respecting the defendant's knowledge of the unfitness of the wine for exportation were struck out, the declaration would still be sufficient to entitle the plaintiff to recover upon the breach of the warranty proved. For, if one man lull another into security as to the goodness of a commodity, by giving him a warranty of it, it is the same thing whether or not the seller knew it at the time to be unfit for sale; the warranty is the thing which deceives the buyer, who relies on it, and is thereby put off his guard. Then, if the warranty be the material averment, it is sufficient to prove that broken to establish the deceit." *Mr. Justice Lawrence* said:—"I take the rule to be that, if the whole of an averment may be struck out without destroying the plaintiff's right of action, it is not necessary to prove it; but otherwise, if the whole cannot be struck out without getting rid of a part essential to the cause of action; for then, although the averment be more particular than it need have been, the whole must be proved or the plaintiff cannot recover."

The next point to be noticed is that *cumulative allegations, or such as merely operate in aggravation are immaterial*, provided that sufficient is proved to establish some right, offence, or justification included in the claim, charge, or defence specified on the record. Where the defendant was charged with composing, printing, and publishing a libel,

it was held sufficient to prove *publication* So on an indictment for *murder*, a prisoner may be convicted of culpable homicide not amounting to murder. On an indictment for killing a sheep with intent to steal the carcass, proof of stealing part of the carcass was held sufficient. In civil actions where special damage is alleged, it need not be proved if the words or actions be actionable *per se* Allegations of *place*, *time*, *number*, and *value* are in general immaterial, unless when *of the essence of the offence*, or necessary to give notice to the accused person of the matter with which he is charged. See Section 440 of the Code of Criminal Procedure.]

PART II.

ON PROOF.

CHAPTER III.—FACTS WHICH NEED NOT BE PROVED.

No evidence required of fact judicially noticed.

56. No fact of which the Court will take judicial notice need be proved.

[As to facts which need not be proved, see also Section 58, *post*]

Facts of which Court must take judicial notice.

57. The Court shall take judicial notice of the following facts:—

(1.) All laws or rules having the force of law now or heretofore in force or hereafter to be in force in any part of British India:

(2.) All public Acts passed or hereafter to be passed by Parliament, and all local and personal Acts directed by Parliament to be judicially noticed:

(3.) Articles of War for Her Majesty's Army or Navy:

(4.) The course of proceeding of Parliament and of the Councils for the purposes of making Laws and Regulations established under the Indian Councils' Act, or any other law for the time being relating thereto.

Explanation.—The word 'Parliament,' in clauses (2) and (4), includes—

1. The Parliament of the United Kingdom of Great Britain and Ireland;
2. The Parliament of Great Britain;
3. The Parliament of England;
4. The Parliament of Scotland, and
5. The Parliament of Ireland.

(5.) The accession and the sign manual of the Sovereign for the time being of the United Kingdom of Great Britain and Ireland:

(6.) All seals of which English Courts take judicial notice: the seals of all the Courts of British India, and of all Courts out of British India, established by the authority of the Governor-General or any Local Government in Council: the seals of Courts of Admiralty and Maritime Jurisdiction and of Notaries Public, and all seals which any person is authorized to use by any Act of Parliament or other Act or Regulation having the force of law in British India:

(7.) The accession to office, names, titles, functions, and signatures of the persons filling for the time being any public office in any part of British India, if the fact of their appointment to such office is notified in the *Gazette of India*, or in the official Gazette of any Local Government:

(8.) The existence, title, and national flag of every State or Sovereign recognized by the British Crown:

(9.) The divisions of time, the geographical divisions of the world, and public festivals, fasts and holidays notified in the official Gazette:

(10.) The territories under the dominion of the British Crown:

(11.) The commencement, continuance, and termination of hostilities between the British Crown and any other State or body of persons:

(12.) The names of the members and officers of the Court, and of their deputies and subordinate officers and assistants, and also of all officers acting in execution of its process, and of all advocates, attorneys, proctors, vakíls, pleaders, and other persons authorized by law to appear or act before it:

(13.) The rule of the road [on land or at sea.[1]]

In all these cases, and also on all matters of public history, literature, science or art, the Court may resort for its aid to appropriate books or documents of reference.

If the Court is called upon by any person to take judicial notice of any fact, it may refuse to do so unless and until such person produces any such book or document as it may consider necessary to enable it to do so.

[1. As to what laws or rules have the force of law in India, see *ante*, pp. 3, 4, 5, 89, note; and the *Introduction to the Statute Law of India* prefixed to the Author's *Chronological Table and Index.* The following is a brief account of the legislative powers exercised by the Governments in India:—

3 & 4 Wm. IV, Cap. 85, A.D. 1833.

By the 3 and 4 Will. IV, Cap. 85, Sec. 39, the superintendence, direction, and control of the whole Civil and Military Government of the British territories and revenues in India became vested in the Governor-General and Councillors, henceforward styled "*the Governor-General of India in Council.*" Section 40 provided that the said Council should consist of *four* ordinary members, instead of three as formerly; and that, of such four, three should be or have been servants of the East India Company: and that the fourth should be appointed, subject to the approbation of His Majesty from amongst persons not servants of the Company, and should sit and vote only at meetings held for the purpose of making Laws and Regulations. Under the 43*rd* Section the *Governor-General in Council* was empowered to legislate for all India; and from 1834 the Acts of the "Governor-General of India in Council" were passed for and became law throughout the three Presidencies. Previous to 1834, there were three Legislative Bodies, one for each Presidency, *viz.*, the Governor-General in Council of the Presidency of Fort William in Bengal for Bengal, the Governor in Council of the Presidency of Fort St. George for Madras, and the

[1] The words in brackets were added by the amending Act, XVIII of 1872.

Governor in Council of the Presidency of Bombay for Bombay. The Regulations passed by these Legislative Bodies had effect only within their own Presidencies, and formed three separate Codes, dating, respectively, from 1793 in Bengal, from 1802 in Madras, and from 1799 in Bombay. For further information as to details and for the change made in the constitution of the Legislative Council in 1853 by the 16*th* and 17*th* Vict., Cap. 95, the reader is referred to the Author's *Introduction* already mentioned.

The Indian Councils' Act.

In 1861, a change was again made in the constitution of the Council of the Governor-General by the 24 and 25 Vict., Cap. 67, "The *Indian* Councils' Act, 1861," and power was once more given to the Governors in Council of the Madras and Bombay Presidencies to make Laws and Regulations for the government of these Presidencies. Such Laws or Regulations are not, however, to have validity until the Governor-General shall have assented thereto, and *such assent shall have been signified to and published by the Governor.* The legislative powers conferred by this Act are thus defined and limited:—

"The Governor of each of the said Presidencies in Council shall have "power at such meetings for the purpose of making Laws and Regula-"tions as aforesaid, and subject to the provisions herein contained, to "make Laws and Regulations for the peace and good government of "such Presidency, and for that purpose to repeal and amend any Laws "and Regulations made prior to the coming into operation of this Act by "*any authority in India*, so far as they affect such Presidency. Provided "always that such Governor in Council shall not have the power of "making any Laws or Regulations which shall in any way affect any of "the provisions of this Act, or of any other *Act of Parliament in force,* "*or hereafter to be in force, in such Presidency.*

"It shall not be lawful for the Governor in Council of either of the "aforesaid Presidencies, except with the sanction of the Governor-"General, previously communicated to him, to make Regulations or take "into consideration any Law or Regulation for any of the purposes next "hereinafter mentioned; that is to say—

1. "Affecting the lands of the Crown, or the public debt of India, "or the public revenue derived from assessment of the land, or the Cus-"toms duties, or any other tax or duty now in force and imposed by the "authority of the Government of India:

2. "Regulating any of the current coin, or the issue of any bills, notes, "or other paper currency:

3. "Regulating the conveyance of letters by the post-office or "messages by the electric telegraph within the Presidency:

4. "Altering in any way the Penal Code of India, as established by "Act of the Governor-General in Council, No 42[1] of 1860:

[1] *Sic*, but evidently a mistake for "45." The Penal Code is Act XLV of 1860.

5. "Affecting the religion or religious rites and usages of any class "of Her Majesty's subjects in India:

6. "Affecting the discipline or maintenance of any part of Her Majesty's Military or Naval Forces:

7. "Regulating patents or copyright:

8. "Affecting the relations of the Government with Foreign Princes "or States.

It was further provided as follows:—

"The Governor-General in Council, so soon as it shall appear to him "expedient, shall, by proclamation, extend the provisions of this Act "touching the making of Laws and Regulations for the peace and good "government of the Presidencies of Fort Saint George and Bombay "(except as hereinafter mentioned) *to the Bengal division of the Presi-* "*dency of Fort William, and shall specify in such proclamation the period* "*at which such provisions shall take effect*, and the number of Councillors "whom the Lieutenant-Governor of the said division may nominate for "his assistance in making Laws and Regulations; and it shall be "further lawful for the Governor-General in Council, from time to time "and in his discretion, by similar proclamation, *to extend the same provi-* "*sions to the territories known as the North-Western Provinces and* "*the Panjáb, respectively.*

"It shall be lawful for the Governor-General, by proclamation, as "aforesaid, to constitute from time to time new provinces for the pur-"poses of this Act, to which the like provisions shall be applicable; and, "further, to appoint from time to time a Lieutenant-Governor to any "province so constituted as aforesaid, and from time to time to declare "and limit the extent of the authority of such Lieutenant-Governor, in "like manner as is provided by the Act of the 17th and 18th years of Her "Majesty, Chapter 77, respecting the Lieutenant-Governors of Bengal "and the North-Western Provinces."

The provisions of the Act were extended to the Bengal division of the Presidency of Fort William from the 18th January, 1862, by a proclamation which appeared in the *Calcutta Gazette* of Saturday, January 18th, 1862. They have not as yet been extended to any other Province.

The restrictions on the legislative powers of the Governor-General are contained in the following proviso:—

Provided always, that the said Governor-General in Council shall not have the power of making any Laws or Regulations which shall repeal or in any way affect any of the provisions of this Act: or any of the provisions of the Acts of the 3rd and 4th years of King William IV, Chapter 85, and of the 16th and 17th years of Her Majesty, Chapter 95, and of the 17th and 18th years of Her Majesty, Chapter 77, which after the passing of this Act shall remain in force: or any provisions of the Act of the 21st and 22nd years of Her Majesty, Chapter 106, entitled "An Act for the better government of India:" or of the Act of the

22nd and 23rd years of Her Majesty, Chapter 41, to amend the same: or of any Act enabling the Secretary of State in Council to raise money in the United Kingdom for the Government of India: or of the Acts for punishing mutiny and desertion in Her Majesty's Army or in Her Majesty's Indian Forces, respectively; but subject to the provisions contained in the Act of the 3rd and 4th years of King William IV, Chapter 85, Section 73, respecting the Indian Articles of War: *or any provisions of any Act passed in this present session of Parliament, or hereafter to be passed, in anywise affecting Her Majesty's Indian territories, or the inhabitants thereof, or the authority of Parliament, or the constitution and rights of the East India Company, or any part of the unwritten laws or constitution* of the United Kingdom of Great Britain and Ireland, whereon may depend in any degree the allegiance of any person to the Crown of the United Kingdom, or the sovereignty or dominion of the Crown over any part of the said territories.

Many Acts contain a Section empowering the Local Government to make Rules for carrying into effect the provisions of the Act and declaring that such Rules, when made and published in the manner provided, shall have the force of law. These Rules fall within the purview of this Section. See also Section 19, Act III (Bom. C.) of 1857, which makes a special provision for Rules made under that Act and relating to Military Cantonments.

Statutes, public, local, and personal.

(2.) Statutes are either public or private, general or special. The distinction between public and private Acts was first made in the reign of Richard III. A *public* or *general* Act is a universal rule applied to the whole community, which the Courts must notice judicially and *ex-officio*, although not formally set forth by a party claiming an advantange under it. But *special* or *private* Acts are rather exceptions than rules, since they only operate upon particular persons and private concerns, and the Courts are not bound to take notice of them, if they are not formally pleaded, unless an express clause is inserted in them that they shall be deemed public Acts and shall be judicially noticed as such without being specially pleaded—which provision is now usually introduced. For convenience of reference, the printed Statute Book of a Parliamentary Session is classed thus:—1. Public General Acts. 2. Local and Personal Acts, declared public and to be judicially noticed. 3. Private Acts, printed by the Queen's printer, and whereof the printed copies may be given in evidence. 4. Private Acts not printed.[1] All Acts of Parliament are to be presumed to be public unless the contrary be declared therein. (See 13 and 14 Vict., Cap. 21.)

(3.) The Articles of War for Native Officers, Soldiers, and other persons in Her Majesty's Indian Army are contained in Act V of 1869.

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[1] Wharton's Law Lexicon, Title *Act*.

(6.) The following are some of the Seals of which English Courts take judicial notice, *viz.*:—the Great Seal; the Queen's Privy Seal; the Seals of the Superior Courts; the Seals of all Courts constituted by Act of Parliament, if Seals are given them by the Act; of the Registries of the Court of Probate; of the County Courts; of the Corporation of London; Seals of Foreign States or British Colonies, see 14 and 15 Vict., Cap. 99, Section 7;[1] 18 and 19 Vict., Cap. 42, Section 3; 15 and 16 Vict., Cap. 86, Section 22; 24 and 25 Vict., Cap. 134, Section 202 (Bankruptcy Act); see also *ante*, p. 147, and Tay. §§ 6, 9, 10, 10A, 10B, and 11.

Seals.

(7.) These provisions, which are far in advance of English law, accord with the rule acted upon in America. In England, the signatures of the Superior Equity and Common Law Judges, of the Commissioners and Registrars of the Courts of Bankruptcy, and in certain cases of the officers of the Courts of Chancery and Bankruptcy in all proceedings under the winding-up Clauses of the Companies' Act, 1862, are *by Statute* judicially noticed. "On the other hand," says Mr. Taylor, "it appears highly probable that the Courts would not recognize the signatures of the Lords of the Treasury to their official letters; and it is even a matter of some doubt whether the Royal Sign Manual would be judicially noticed." See, in connection with this clause,

Names, Titles, &c., of Public Officers.

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[1] This Section enacts that "*all proclamations, treaties, and other acts of State*, of any foreign State, or *of any British Colony, and all judgments, decrees, orders, and other judicial proceedings of any Court of Justice in any foreign State or in any British Colony, and all affidavits, pleadings, and other legal documents*, filed or deposited in any such Court, *may be proved* in any Court of Justice, or before any person having by law or by consent of parties authority to hear, receive, and examine evidence *either by examined copies or by copies authenticated* as hereinafter mentioned; that is to say, if the document sought to be proved be a *proclamation, treaty, or other act of State*, the authenticated copy, to be admissible in evidence, must purport to be sealed with the Seal of the foreign State or British Colony to which the original document belongs; and if the document sought to be proved be a *judgment, decree, order, or other judicial proceeding* of any foreign or colonial Court, or any *affidavit, pleading, or other legal document*, filed or deposited in any such Court, the authenticated copy, to be admissible in evidence, must purport *either to be sealed with the seal of the foreign and colonial Court* to which the original document belongs, or, in the event of such Court *having no seal*, to be signed by the Judge, or if there be more than one Judge, by any one of the Judges of the said Court, and *such Judge shall attach to his signature a statement in writing on the said copy that the Court whereof he is a Judge has no seal*; but if any of the aforesaid authenticated copies shall purport to be sealed or signed as hereinbefore respectively directed, the same shall respectively be admitted in evidence in every case in which the original document could have been received in evidence, *without any proof of the seal, where a seal is necessary, or of the signature, or of the proof of the statement attached thereto where such signature and statement are necessary, or of the judicial character of the person appearing to have made such signature and statement.*"

I Ind. Jur N. S. 106, and *Tamor Singh* v. *Kalidas Rai*, IV B. L. R. O. J. 51, where judicial notice was taken of a jailor's signature under Section 16 of the Prisoners' Testimony Act, XV of 1869.

Divisions of time, &c.

(9). The Bengali, Willaití, Faslí, Sambat or Hindí, Hijrí, and Jalús eras will therefore be judicially noticed in those districts in which they are current, and reference may be made to the usual almanacs, when occasion requires.

By Section 26 of the Limitation Act, IX of 1871, all instruments are, for the purposes of that Act, to be deemed to be made with reference to the Gregorian Calendar.

(12) With this may be read Section 7 of The Pleaders', Mukhtars', and Revenue Agents' Act (XX of 1865), which enacts that "the High Court shall cause the name of every person, who shall be admitted a Pleader or a Mukhtar pursuant to the provisions of this Act, to be enrolled in books to be provided and kept for that purpose in such Court. *The Courts shall take judicial notice whether a Pleader or Mukhtar is enrolled or not.*"

"*The Court may resort for its aid to appropriate books,*" *&c.*—This is in advance of English law, under which, though an expert, called as a witness, will be allowed to refresh his memory by referring to a professional treatise regarded by him as of authority, yet the books themselves cannot be cited. Medical works, for example, and, in a case connected with a horse, works on farriery, have been rejected.[1] As instances of the application of the rule in India, with regard to matters of public history, &c, the following cases may be referred to:—*Isshur Ghose* v. *James Hills*, W. R. Special Number 84 · *James Hills* v. *Isshur Ghose*, id 131 and 148: *Tukuráni Dasi* v. *Bisheshar Mukherji*, III W. R., Act X Rul. 29: and the *Dyce Sambre* case, Indian Jurist of 30th April, 1867. In these cases Mill's History of India, Mill's Political Economy, McCulloch's Political Economy, Wilson's History of England, Sanads, Treaties, and other similar works and documents were freely quoted by the Bench and the Bar. In the case of *The Collector of Madura* v. *Mútú Ramalinga Sathupathy*, XII Moo. Ind. Ap. 398, sworn translations of Sanscrit works, little known, embodying Hindú law, as to the custom in the different schools with respect to the law of adoption, were admitted both in India and England.

The last clause of the Section is in accordance with *Von Omeron* v. *Dowich*, in which Lord Ellenborough declined to take judicial notice of the King's proclamation, the counsel not being prepared with a copy of the Gazette in which it had been published.[2] In *Reg.* v. *Withers* it became a material question to consider how far the prisoner

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[1] *Darby* v. *Ousley*, 20 Jurist, 497.

[2] 2 Campbell's Rep. 44.

owed obedience to his sergeant, and this depended on the Articles of War, which were not produced at the trial. The Judges were of opinion that they ought to have been produced.[1] It will be observed that though the Court *may* refuse, it is not imperative that it should refuse. The Gazettes are usually supplied to, filed, bound, and preserved in the offices of all Courts in India, and when any matter may be placed beyond doubt by the mere production of the *Gazette*, the Court might properly have it produced from its own record-room. Pleaders should, however, make a request to this effect in sufficient time to prevent delay at the hearing.]

Facts admitted.

58. No fact need be proved in any proceeding which the parties thereto or their agents agree to admit at the hearing, or which, before the hearing, they agree to admit by any writing under their hands, or which by any rule of pleading in force at the time they are deemed to have admitted by their pleadings: Provided that the Court may, in its discretion, require the facts admitted to be proved otherwise than by such admissions.

Notice to admit Documents.

[The Indian Code of Civil Procedure does not contain any provision corresponding with Section 117 of the Common Law Procedure Act, 1852 (15 & 16 Vict., Cap. 76), under which either party may call upon the other by notice to admit any document, saving all just exceptions: the costs of proving the document, in case of refusal or neglect to admit, falling upon the person so refusing or neglecting. The above Section will, to a certain extent, supply the deficiency, when the parties are really desirous of saving expense.

In the case *Bibi Takai Sherob* v. *Beglar* (VI Moo. Ind. Ap. 521) the Lords of the Privy Council made the following observations:—" It is said on the part of the appellant, that that will was not properly in evidence, for although a will was produced (or rather an official copy of a will was produced), there was no examination of witnesses, and though that will had been proved by *Gobind*, as to the personal estate, that would be no evidence against the appellant; at all events it would not affect the real estate. If it would be necessary to decide that question, their Lordships would be inclined to hold that the will was sufficiently in evidence for the purposes of this suit. The Regulation[2]

[1] See *R.* v. *Holt*, 5 Term. Rep. 446.

[2] What Regulation is here referred to, there is nothing in the report to show: but it may be observed that all the old Regulations relating to civil procedure have been repealed by Act X of 1861 and subsequent repealing Acts.

provides that, where documents are produced, and they are not disputed, they shall be received without proof." In a recent case these observations were referred to as substantially laying down that the rules which regulate the conduct of cases in the Mofussil Courts do not necessitate the proving of documents which are not disputed (*Nand Kishor Das Mahant* v. *Ram Kalp Rai*, VI B. L. R. App. 49). It would appear, however, that their Lordships spoke with especial reference to the state of things antecedent to the operation of the Code of Civil Procedure. Certainly it would be difficult to reconcile any such general rule with other observations which are to be found in more recent judgments, and which strongly impress the necessity of parties proving by competent evidence the case which they must prove in order to succeed. (See *ante*, p. 106.) Under the New Act, there can be no doubt that documents, if not expressly admitted, must be proved. (See Section 67, *post*.)

As to admissions by Vakíls, see *ante*, page 26, *note*.]

CHPATER IV.—OF ORAL EVIDENCE.

Proof of facts by oral evidence.

59. All facts, except the contents of documents, may be proved by oral evidence.

[For instance, the adjustment of an account may be proved by oral evidence (*Purnima Chaudhrain and others* v. *Nityanand Saha and others*, B. L. R. Sup. Vol. F. B. 3). Where there is a conflict of oral evidence, the Privy Council have more than once remarked upon the value of documentary evidence as a guide to show on which side the truth lies (*Mussamat Imam Bandí* v. *Hargobind Ghose*, IV Moo. Ind. Ap. 403: *Ekauri Singh* v. *Hiralal Seal*, II B. L. R. P. C. 8). It may also be observed that in a similar conflict much greater credence is to be given to men's acts than to their alleged words, which are so easily mistaken or misrepresented (*Mír Asadúla* v. *Mussamat Bibí Imaman*, I. Moo. Ind. Ap. 43).]

Oral evidence must be direct.

60. Oral evidence must, in all cases whatever, be direct; That is to say—

If it refers to a fact which could be seen, it must be the evidence of a witness who says he saw it;

If it refers to a fact which could be heard, it must be the evidence of a witness who says he heard it;

If it refers to a fact which could be perceived by any other sense or in any other manner, it must be

the evidence of a witness who says he perceived it by that sense or in that manner;

If it refers to an opinion or to the grounds on which that opinion is held, it must be the evidence of the person who holds that opinion on those grounds:

Provided that the opinions of experts expressed in any treatise commonly offered for sale, and the grounds on which such opinions are held, may be proved by the production of such treatises if the author is dead or cannot be found, or has become incapable of giving evidence, or cannot be called as a witness without an amount of delay or expense which the Court regards as unreasonable;

Provided also that, if oral evidence refers to the existence or condition of any material thing other than a document, the Court may, if it thinks fit, require the production of such material thing for its inspection.

[See *ante*, pp. 111—112.

The first *proviso*, which should be read with Sections 45 and 46, *ante*, pp. 240—244, is an innovation upon the principles of English law, which do not admit this evidence. The treatise, in order to be admissible, must be one *commonly offered for sale*. The burden of proving that any particular treatise is commonly offered for sale will be upon the person who desires to give such treatise in evidence (see Section 104, *post*).

With reference to the second *proviso*, see the remarks at page 75, *ante*.]

CHAPTER V.—OF DOCUMENTARY EVIDENCE.

Proof of contents of documents.

61. The contents of documents may be proved either by primary or by secondary evidence.

Primary evidence.

62. Primary evidence means the document itself produced for the inspection of the Court.

Explanation 1.—Where a document is executed in several parts, each part is primary evidence of the document:

[These are usually known as *duplicate*, *triplicate originals*.]

Where a document is executed in counterpart, each counterpart being executed by one or some of the parties only, each counterpart is primary evidence as against the parties executing it.

[And secondary evidence as against the other parties. See clause 4, Section 63, *post*, and Tay. § 396.]

Explanation 2.—Where a number of documents are all made by one uniform process, as in the case of printing, lithography, or photography, each is primary evidence of the contents of the rest; but where they are all copies of a common original, they are not primary evidence of the contents of the original.

Illustration.

A person is shown to have been in possession of a number of placards, all printed at one time from one original. Any one of the placards is primary evidence of the contents of any other, but no one of them is primary evidence of the contents of the original.

[*R. Watson*, 32 Howell's State Trials, 82—86.]

Secondary evidence.

63. Secondary evidence means and includes—

(1.) Certified copies given under the provisions hereinafter contained;

[See Section 76, *post*.]

(2.) Copies made from the original by mechanical processes which in themselves insure the accuracy of the copy, and copies compared with such copies;

[Such, for example, as the processes mentioned in Explanation 2, Section 62. Read Illustration (*c*) with the latter portion of this clause.]

(3.) Copies made from or compared with the original;

(4.) Counterparts of documents as against the parties who did not execute them;

(5.) Oral accounts of the contents of a document given by some person who has himself seen it.

Illustrations.

(*a.*) A photograph of an original is secondary evidence of its contents, though the two have not been compared, if it is proved that the thing photographed was the original.

(*b.*) A copy compared with a copy of a letter made by a copying machine is secondary evidence of the contents of the letter, if it is shown that the copy made by the copying machine was made from the original.

(*c.*) A copy transcribed from a copy, but afterwards compared with the original, is secondary evidence; but the copy not so compared is not secondary evidence of the original, although the copy from which it was transcribed was compared with the original.

(*d.*) Neither an oral account of a copy compared with the original, nor an oral account of a photograph or machine copy of the original, is secondary evidence of the original.

[Reading together Clause 2 and Illustrations (*b*) and (*c*), it will appear that a *copy of a copy*, *i. e.*, a copy transcribed from and compared with a copy, is inadmissible, unless the copy with which it was compared were a copy made by some mechanical process which in itself insures the accuracy of such copy. The effect of this is that the following cases are no longer law:—*Unída Rajaha Bommarauze Bahadur* v. *Pemmasamy Venkatadry Naidú*, VII Moo. Ind. Ap. 128; *Ajúdha Persad Singh* v. *Amrao Singh*, VI B. L. R. 509; *Tayabanissa Bibí* v. *Kuwar Sham Kishore Rai*, VII B. L. R. 627; *Makbul Ali* v. *Srimatí Masnad Bibí and others*, III B. L. R. Civ. Rul. 54. See also *Srímant Kowar* v. *Akbar Mandal and others*, VIII W. R. Civ. Rul. 438, and *Rájá Lílanand Singh and others* v. *Nasíb Singh and others*, VI W. R. Civ. Rul. 80 (here a copy of a copy was rejected).

The correctness of certified copies will be presumed under Section 79, *post;* but that of other copies will have to be proved. This proof may be afforded by calling a witness, who will swear that he has compared the copy tendered in evidence with the original, or with what some other person read as the contents of the original, and that such copy is correct. It is not necessary for the persons examining to exchange papers and read them alternately both ways.[1] It may seem scarcely necessary to remark that proof of a copy being a *correct copy* is no proof of the *original*, *i. e.*, of its execution, genuineness, &c. (*Ram Jadú Gangúlí* v. *Lakhí Narain Mandal*, V R. C. & C. R., Act X Rul. 23).]

Proof of documents by primary evidence.

64. Documents must be proved by primary evidence except in the cases hereinafter mentioned.

[1] Tay. § 1389.

Cases in which secondary evidence relating to documents may be given.

65. Secondary evidence may be given of the existence, condition, or contents of a document in the following cases:—

(*a.*) When the original is shown or appears to be in the possession or power

of the person against whom the document is sought to be proved, or

of any person out of reach of, or not subject to, the process of the Court, or

of any person legally bound to produce it,

and when, after the notice mentioned in section sixty-six, such person does not produce it;

[Any secondary evidence is here admissible. See below.]

(*b.*) When the existence, condition, or contents of the original have been proved to be admitted in writing by the person against whom it is proved or by his representative in interest;

[The written admission is the secondary evidence here admissible. See below. As to oral admissions of the contents of a document, see *ante*, p. 100.]

(*c.*) When the original has been destroyed or lost, or when the party offering evidence of its contents cannot, for any other reason not arising from his own default or neglect, produce it in reasonable time;

[Any secondary evidence is here admissible. See below.]

(*d.*) When the original is of such a nature as not to be easily moveable;

[Any secondary evidence is here admissible. See below.]

(*e.*) When the original is a public document within the meaning of section seventy-four;

[A *certified copy* is the only evidence here admissible. See below.]

(*f.*) When the original is a document of which a certified copy is permitted by this Act, or by any

other law in force in British India, to be given in evidence;

[A certified copy is the only evidence here admissible. See below.]

(*g*.) When the originals consist of numerous accounts or other documents which cannot conveniently be examined in Court, and the fact to be proved is the general result of the whole collection.

[See the last clause of the Section.]

In cases (*a*), (*c*), and (*d*), any secondary evidence of the contents of the document is admissible.

In case (*b*), the written admission is admissible.

In case (*e*) or (*f*), a certified copy of the document, but no other kind of secondary evidence, is admissible.

In case (*g*) evidence may be given as to the general result of the documents by any person who has examined them, and who is skilled in the examination of such documents.

[(*c*.) The person wishing to give the secondary evidence must show that the original has been destroyed or lost, &c. (See Section 104, *post*, and Illustration (*b*) thereto.) Proof of loss may be given by evidence that the document once existed, and that search was made for it to no purpose in the place or places where it would most likely be found. This search need not necessarily have been recent or made for the purposes of the suit. The Lords of the Judicial Committee of the Privy Council very early applied to Indian cases the rule that copies are inadmissible without proof of search for the originals, see *Mír Asadúla* v. *Bibí Imaman*, I Moo. Ind. Ap. 41: *Syud Abbas Ali Khan* v. *Yadún Raní Reddy*, III Moo. Ind. Ap. 156. In the latter case a bond was said to have been torn, and the alleged fragments were produced, but there was no evidence that they were really the fragments of the bond in question. (See also *Súkram Súkal and others* v. *Ramlal Súkal*, IX W. R. Civ. Rul. 248: *Rúpmanjúri Chaudhraní* and *Jagat Chandra Sirkar* v. *Ram Lal Sirkar and others*, I W. R. Civ. Rul. 145: *Mafizudín Kazí* v. *Meher Alí and others*, I W. R. Civ. Rul. 212: and *Eshan Chandra Chaudhrí* v. *Beirab Chandra Chaudhrí*, V W. R. Civ. Rul. 21.) There is one case in which oral evidence cannot be admitted of a writing destroyed or lost, and which therefore forms an exception to the general rule contained in this clause, *viz*., when the writing is an acknowledgment or promise which would have the effect of extending

the period of limitation under Section 20 of the Indian Limitation Act, IX of 1871. (See clause (*c*) of this Section, *post*).

(*d*.) As, for example, in the case of inscriptions on walls, tombstones, monuments (see *ante*, pp. 130, 135), surveyors' marks on boundary trees, and where an alleged libel had been written on the wall of the Liverpool gaol.

(*f*.) See Sections 76, 78, *post*.

(*g*.) See also Section 181 of the Code of Civil Procedure, *ante*, pp. 144, 145.

With reference to the last four paragraphs, which provide what kind of secondary evidence is to be given in each case, it may be observed that there is no provision for cases in which two causes for non-production of the original are combined. For example, if the original be a record of a Court of Justice (*e*); and if it also have been lost or destroyed (*c*). Such a case has more than once occurred in India. In *Babú Gúrú Dyal Singh* v. *Darbari Lal Tewari*, VII W. R. Civ. Rul. 18, the record was lost in transit from the Court of first instance to the Appellate Court, and the Calcutta High Court directed the admission of secondary evidence of the papers which made up the entire record. (See also *Banwari Lal* v. *J. Furlong*, VIII W. R. Civ. Rul. 38: *Rani Emamun* v. *Hardyal Singh*, W. R. Jan.—July, 1864, p. 301 (Decree destroyed during the mutiny): *Ranjit* v. *Chuni Lal*, I N-W-P. Rep. 78.)

This section is applicable to both civil and *criminal* cases, and is a relaxation of the rule of English law which requires stricter proof in criminal than in civil proceedings, it having been decided in the former that the *original* registers of births, deaths, marriages, &c., must be produced and that *copies* will not be sufficient.]

Rules as to notice to produce.

66. Secondary evidence of the contents of the documents referred to in section sixty-five, clause (*a*), shall not be given unless the party proposing to give such secondary evidence has previously given to the party in whose possession or power the document is [or to his attorney, or pleader[1]], such notice to produce it as is prescribed by law, and if no notice is prescribed by law, then such notice as the Court considers reasonable under the circumstances of the case:

Provided that such notice shall not be required in order to render secondary evidence admissible in

[1] The words in brackets were added by the amending Act, XVIII of 1872.

any of the following cases, or in any other case in which the Court thinks fit to dispense with it :—

(1.) When the document to be proved is itself a notice ;

(2.) When from the nature of the case, the adverse party must know that he will be required to produce it ;

(3.) When it appears or is proved that the adverse party has obtained possession of the original by fraud or force ;

(4.) When the adverse party or his agent has the original in Court ;

(5.) When the adverse party or his agent has admitted the loss of the document ;

(6.) When the person in possession of the document is out of reach of, or not subject to, the process of the Court.

[The law which at present prescribes notice to produce is to be found in Sections 40, 43, 107, and 153 of the Code of Civil Procedure, which are as follow :—

40. If the plaintiff require the production of any written document *in the possession or power of the defendant*, he may, at the time of presenting the plaint, deliver to the Court a description of the document, in order that the defendant may be required to produce the same.

43. The summons to appear shall *order the defendant to produce any written document in his possession or power*, of which the plaintiff demands inspection, or upon which the defendant intends to rely in support of his defence.

Notice to produce.

107. "Whenever any of the parties to a suit is desirous that any document, writing, or other thing, which he believes to be *in the possession or power of another of the parties* thereto, should be produced at any hearing of the suit, and the production of such document, writing, or other thing has not previously been required, under the provisions of Sections 40 and 43, he shall, at the earliest opportunity, deliver to the Court two notices in writing to the party in whose possession or power he believes the document, writing, or other thing to be, calling upon him to produce the same; and one of such notices shall be filed in Court, and the other shall be delivered by the Court to the Nazir or other proper officer to be served upon such party."

153. Any person, *whether a party to a suit or not*, may be summoned *to produce a document*, without being summoned to give evidence; and

any person, summoned merely to produce a document, shall be deemed to have complied with the summons, if he cause such document to be produced instead of attending personally to produce the same.

It may be observed that where the document is in the possession or power of a party to the suit, the notice to produce can also be served on his *recognized agent*, as defined in Section 17 of the Code of Civil Procedure.

Persons omitting to produce document, after service of notice, may be proceeded against criminally under Section 175 of the Indian Penal Code.[1]]

Proof of signature and handwriting of person alleged to have signed or written document produced.

67. If a document is alleged to be signed or to have been written wholly or in part by any person, the signature or the handwriting of so much of the document as is alleged to be in that person's handwriting must be proved to be in his handwriting.

[As to the method of proof, see Section 47, *ante*, p. 245, and Section 73, *post*.]

Proof of execution of document required by law to be attested.

68. If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence.

Proof where no attesting witness found.

69. If no such attesting witness can be found, or if the document purports to have been executed in the United Kingdom, it must be proved that the attestation of one attesting witness at least is in his handwriting, and that the signature of the person executing the document is in the handwriting of that person.

Admission of execution by party to attested document.

70. The admission of a party to an attested document of its execution by himself shall be sufficient proof of its execution as against him,

[1] In Section 65, "existence, condition, or contents" are spoken of. In Section 66, "contents" only occurs. Can secondary evidence of existence or condition be given in any case without notice?

though it be a document required by law to be attested.

[The admission here spoken of, which relates to the *execution*, must be distinguished from the admission mentioned in Section 22, *ante* p. 100, and that mentioned in clause (*b*), Section 65, *ante*, p. 283, which relate to the contents, &c.]

Proof when attesting witness denies the execution.

71. If the attesting witness denies or does not recollect the execution of the document, its execution may be proved by other evidence.

Strictness of English law.

["The general rule," says Mr. Taylor, "which requires the production of an attesting witness, when the validity of an instrument depends upon its formal attestation, is so inexorable, that it applies even to a cancelled or a burnt deed; as also to one the execution of which is admitted by the party to it: and that, too, though such admission be deliberately made either in open Court, or in a subsequent agreement or even in a sworn answer to a bill of discovery filed against the person in the cause. Nay, a party in a cause, who is called as a witness by his opponent, cannot be required or even permitted to prove the execution by himself of any instrument to the validity of which attestation is requisite, so long as the attesting witness is capable of being called. So, also, the attesting witness must be called, though, subsequently to the execution of the deed, he has become blind; and the Court will not dispense with his presence on account of illness, however severe. If the indisposition of the witness be of long standing, the party requiring his evidence should have applied for power to examine him on interrogatories; and if he be taken suddenly ill, a motion must be made to postpone the trial."[1] These strict rules continued to be applied not only to documents *required by law* to be attested, but also to documents which, when produced, appeared to be signed by *subscribing witnesses*, until the passing of the Common Law Procedure Act, 1864 (see note to Section 72, *post*). The above four Sections of the Indian Act are applicable only to documents *required by law to be attested*, and they further contain a reasonable relaxation of that strictness which has been found in practice detrimental to justice. Their provisions may thus be summarized:—

Reasonably relaxed by the Indian Act.

(1) When there is an attesting witness alive, subject to the process of the Court and capable of giving evidence, he *must* be called. (2) When here is no attesting witness alive, subject to the process of the Court

[1] § 1461

and capable of giving evidence, it must be proved by other evidence—(see Section 47, *ante*, p. 244, and Section 73, *post*),—(*a*) that the attestation of one attesting witness at least is in his handwriting; and (*b*) that the signature of the person executing the document is in the handwriting of such person. The admission of a party to the document will, so far as such party is concerned, supersede the necessity either of calling the attesting witness or of giving any other evidence. Section 71 is not so clear as it might be. Suppose that one of two or more attesting witnesses being called denies or does not recollect the execution of the document, can other evidence be given to prove it, even though there be another attesting witness alive, subject to the process of the Court and capable of giving evidence, who is not produced?

Signature.

The Evidence Act contains no definition of what is a "signature." Section 69 seems to imply that the attestation of the attesting witness must be in his own handwriting, which implication assumes that the witness knows how to write. As a matter of fact, however, in India a large proportion of attesting witnesses are marksmen. The definition of "signature" contained in Section 3 of the Registration Act, VIII of 1871, includes and applies to the affixing of a mark. See also Section 50 of the Indian Succession Act, X of 1865, which speaks of the testator "signing or affixing his mark" and of the witnesses "signing."[1] Sealing will not do for a signature. (*In the goods of Byrd*, 3 Curt. 117: and see *Illustration* to *Explanation* 2, Section 20 of the Indian Limitation Act, IX of 1871.)

There are few documents which are required by law to be attested in India and out of the Presidency Towns. Wills made after the first day of January, 1866, by persons other than Hindús, Muhammadans, or Budhists; and wills made by Hindús, Jainas, Sikhs, and Budhists on or after the first day of September, 1870, in the territories subject to the Lieutenant-Governor of Bengal, and in the towns of Madras and Bombay, or relating to immovable property situate within those limits, must be attested (see Sections 50 and 331 of Act X of 1865; and Act XXI of 1870).

It does not very clearly appear from the above Sections whether the attesting witness, when producible, must be called, if the document itself is not forthcoming, and is, therefore, not *used as evidence* (Section 68); but secondary evidence is given of its contents under the provisions of Sections 65 and 66, *ante*, pp. 283, 285. According to English law, when an instrument is proved to be in the possession of the adverse party, who refuses to produce it after notice, other evidence may be given without calling the attesting witness.

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[1] Mr. Stokes thinks that, as "affixing his mark" is not used as to the witnesses, signature will be required. (*Stokes' Indian Succession Act, p.* 32).

When the document is *thirty years old*, it is not necessary to call the attesting witness. See Section 90, *post*).]

Proof of document not required by law to be attested.

72. An attested document not required by law to be attested may be proved as if it was unattested.

[This Section corresponds with Section 37 of the repealed Act, II of 1855, and with Section 26 of the Common Law Procedure Act, 1854, which latter is as follows:—"It shall not be necessary to prove by the attesting witness any instrument, *to the validity of which attestation is not requisite;* and such instrument may be proved by admission or otherwise, as if there had been no attesting witness thereto." This Section applies to two sets of cases, *viz.*:—

1*st*,—When the parties themselves, or those under whom they claim or act, have expressly directed that the instrument be attested by one or more witnesses.

2*nd*,—When attestation is required by some Act or Statute.

It may be that the Section of the Indian Act is intended to apply to the latter set of cases only. This depends upon whether the phrase "*required by law*" will or will not be held to refer, as it seems intended, to legislative enactment only.]

Comparison of handwritings.

73. In order to ascertain whether a signature, writing, or seal is that of the person by whom it purports to have been written or made, any signature, writing, or seal admitted or proved to the satisfaction of the Court to have been written or made by that person may be compared with the one which is to be proved, although that signature, writing, or seal has not been produced or proved for any other purpose.

The Court may direct any person present in Court to write any words or figures for the purpose of enabling the Court to compare the words or figures so written with any words or figures alleged to have been written by such person.

["English law, until recently," says Mr. Taylor, "did not allow the witness or even the jury, except under certain special circumstances, actually to compare two writings with each other in order to ascertain whether both were written by the same person. This technical rule of the Common Law—which was certainly *not* based on common sense,

and which was directly opposed to the practice of our own Ecclesiastical Courts, of the French Courts, and of the Courts of many of the most enlightened States in America—has, happily for the administration of justice, been at length abrogated by the Legislature, at least as far as relates to *civil* proceedings. Section 27 of the Common Law Procedure Act, 1854, enacts that, "comparison of a disputed writing with any writing proved to the satisfaction of the Judge to be genuine shall be permitted to be made by witnesses, and such writings and the evidence of witnesses respecting the same may be submitted to the Court and jury as evidence of the genuineness or otherwise of the writing in dispute." § 1667. This Section applies to *civil* cases only. The Section of the Indian Act applies to all cases, civil and criminal. The comparison may be made by witnesses (see Section 47, *ante*) or by the Court. The new Section differs somewhat from the corresponding Section (48) of the repealed Act, II of 1855, *viz.*, "On an enquiry whether a signature, writing, or seal is genuine, any *undisputed* signature, writing, or seal of the party, whose signature, writing, or seal is under dispute, may be compared with the disputed one, though such signature, writing, or seal be on an instrument, which is not evidence in the cause." The following cases decided under this Section may be referred to:—*Puran Chandra Chatterji* v. *Girish Chandra Chatterji*, IX W. R. Civ. Rul. 450: *Rajendra Nath Haldar* v. *Jugendra Nath Haldar and others*, VII B. L. R. 216 (Decision of a Native Judge on a question of native handwriting preferred by the Judicial Committee to that of the English Judges of the High Court): *Kurali Persad Misser* v. *Anantaram Hajra and others*, VIII B. L. R. 490 (Finding of forgery on comparison of handwriting only disapproved): and *The Queen* v. *Kartick Chandra Haldar and another*, V R. C. and C. R. Crim. Rul. 58. Can a witness, called to prove handwriting, be tested in cross-examination by showing him other documents and asking him whether they are in the same handwriting as that in dispute, and then, if he reply in the affirmative, proving that they are not so? Mr. Taylor is in favour of such a practice. There does not seem to be anything in the Indian Evidence Act opposed to its adoption.]

PUBLIC DOCUMENTS.

Public documents.

74. The following documents are public documents:—

1. Documents forming the Acts, or records of the Acts—

(i) of the sovereign authority,

(ii) of official bodies and tribunals, and

(iii) of public officers, legislative, judicial and executive, whether of British India, or of any other part of Her Majesty's dominions, or of a foreign country.

2. Public records kept in British India of private documents.

[Clause 2 is important. Certified *copies of the copies* (of registered documents) transcribed in the Registers kept under the Registration laws, will under its provisions be admissible as secondary evidence. See Sections 51 and 57 of Act VIII of 1871, and page 293, *post.*]

Private documents.

75. All other documents are private.

Certified copies of public documents.

76. Every public officer having the custody of a public document, which any person has a right to inspect, shall give that person on demand a copy of it on payment of the legal fees therefor, together with a certificate written at the foot of such copy that it is a true copy of such document or part thereof as the case may be, and such certificate shall be dated and subscribed by such officer with his name and his official title, and shall be sealed, whenever such officer is authorized by law to make use of a seal, and such copies so certified shall be called certified copies.

Explanation.—Any officer who, by the ordinary course of official duty, is authorized to deliver such copies, shall be deemed to have the custody of such documents within the meaning of this section.

Who are entitled to certified copies?

[Whether or not a person will be *entitled to a copy of a public document* will therefore depend upon whether or not he has *a right to inspect it.* The question whether a person has a right to inspect any particular document or documents will in some cases be somewhat difficult to answer. There is no general provision on the subject to be found in any enactment in force in British India, although there are some special provisions applicable to particular cases and which will be noticed presently. Mr. Taylor, speaking of the Statute[1] which placed

[1] 1 & 2 Vict., Cap. 94.

under the charge and superintendence of the Master of the Rolls the records of the Executive, Legislative, and Judicial Departments of the British Government, observes that it contains no section directly entitling the public to inspect these documents, or declaring whether they have any, or what remedy, in the event of their being refused access to them. He further observes that, although at the present day the question, whether the public have a strict legal right to inspect these records, is not likely to be mooted,[1] it would be difficult to establish the right, except as to such of the documents as are the records of the superior Courts of law or equity; and even with respect to these it may be doubtful whether the Queen's Bench would interfere by *mandamus* unless the applicant was prepared to show that he was interested in the document which he sought to inspect. Indeed, it may be laid down with tolerable safety, as a rule applicable alike to the general records of the realm and to all other writings of a public nature, that, if the disclosure of their contents would, in the opinion of the Court, or of the chief executive Magistrate, or of the head of the department under whose control they may be kept, be *injurious to the public interests*, an inspection would not be granted.[2]

Acts entitling to copies or to inspection.

Under the provisions of the Indian Registration Act, VIII of 1871, five Registers are kept, *viz.*, Nos. 1, 2, 3, and 4, in all Registration offices, and No. 5 in the offices of Registrars.

I. In Book No. 1 are entered or filed all documents or memoranda which have been registered and which relate to *immovable property*, whether the registration of such documents or memoranda be compulsory or optional. II. In Book No. 2 are recorded the reasons for refusals to register. III. Book No. 3 is the Register of Wills and authorities to adopt. IV. Book No. 4 is a Miscellaneous Register in which are entered all instruments (other than those relating to immovable property), the registration of which is optional. V. Book No. 5 is the Register of Deposits of Wills deposited with Registrars in sealed covers.[3] Books Nos. 1 and 2 and the Indexes to Book No. 1 shall be at all times open to inspection by any person applying to inspect the same: and copies of entries in these books must be given to *all persons* applying therefor. Copies of the entries in Books Nos. 3 and 4 and in the Indexes relating thereto shall be given to any person executing or claiming under the documents to which such entries respectively refer: but the requisite search can be made only by the registering officer. All such copies are to be signed and sealed, and they are *admissible for the purpose of*

[1] Rules having been made under which free access is afforded to all persons having occasion to inspect them.

[2] Taylor, § 1336.

[3] See Sections 17, 18, 42, and 51 of the Registration Act.

proving the contents of the original documents.[1]—Persons are entitled to search marriage Registers kept under Act XV of 1872 and to obtain copies thereof.[2] Declarations of the keepers of printing presses and of the printers and publishers of periodicals are open to inspection, and copies of them must be given on payment of the proper fee.[3] The Register of copyright in books published in India, kept in the office of the Secretary to the Government of India, is open to inspection, and copies of the entries therein are to be given to persons applying for them.[4] Every person is entitled to inspect the Registers and documents kept by the Registrar of Joint Stock Companies and to obtain copies.[5] None of the Acts, to which reference has just been made, specifies the remedy to be resorted to, if inspection or copies be refused. In England the remedy is by application to the Court of Queen's Bench for a *mandamus.*

Records of Civil Courts.

Under the provisions of the Code of Civil Procedure (Section 198) certified copies of the decrees and judgments of the Courts of *original jurisdiction* must be furnished to the parties or their pleaders on application and on the production of the necessary stamp paper. These copies must be made at the expense of Government. In the *appellate courts* parties are entitled to copies of the decrees only (Section 360).

There is no express provision of the Legislature entitling parties or others to copies of any other portions of the records of the Civil Courts: but, as a matter of practice, copies are usually given to any of the *parties* who apply for them. In Bengal copies are too commonly given to persons, who are not parties and who have no actual interest in the cases to which the records belong. The Courts are thus flooded with irrelevant documentary evidence (see *ante*, p. 12, *note*), the presentation and reception of which could be to a great extent obviated, if, according to the rule followed in England, copies were refused to persons having no interest.

Records of Criminal Courts.

In criminal cases an accused person committed under the Code of Criminal Procedure to the High Court or to the Court of Session, is entitled to a copy of the charge free of all expense; and, if he apply within a reasonable time, to copies of the depositions, these latter copies to be made at his expense, unless the Magistrate see fit to give them

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[1] See Section 57 of the Registration Act.

[2] See Sections 79 and 80 of the Act.

[3] See Section 6, Act XXV of 1867.

[4] See Section 3, Act XX of 1847.

[5] See Clause 5, Section 190 of Act X of 1866. For other public Registers in India, see *ante*, p. 160.

free of cost (see Sections 199 and 201). Under the provisions of Section 276, "a copy of the judgment or other order passed by any Criminal Court, and, in cases tried by jury, of the Judge's charge to the jury, shall be furnished without delay on the application of any person affected by such sentence or order. Such copy shall be made at the expense of the person applying for it, unless he is in jail, or unless the Court, for some special reason, sees fit to grant such copy free of expense."

A person in confinement under a final sentence or order passed by a Criminal Court and desirous of appealing against the same is entitled to a copy thereof as well as of the judgment or reasons for passing it on unstamped paper.[1] The new Code of Criminal Procedure, like the former Code, contains no provisions entitling parties to copies of any other papers than those just mentioned, *e. g.*, to copies of depositions in summons or warrant cases tried by Magistrates or in cases tried by the Court of Session. Under the former Code the Madras High Court refused to direct a Sessions Judge to furnish a person convicted with copies of the notes of the evidence and proceedings in the case (*The Queen* v. *Sabbaya Gaundan*, 1 Mad. Rep. 138).

In a case which came before the Calcutta High Court, it was held that a Magistrate had wrongly refused to a prisoner under trial before him copies of certain papers which he required for his defence. In three at least of the four papers with which this case was concerned, the prisoner had an interest, although none of them fell within the express provisions of the law (*In the matter of the petition of Sib Persad Panda*, VI B. L. R. App. 59.

It is to be noted that the certificate is to be written *at the foot* of the copy, and not at the top, as has hitherto been the practice, in Bengal at least.

For the presumption that is to be made as to the genuineness of certified copies, see Section 79, *post.*]

Production of such copies.

77. Such certified copies may be produced in proof of the contents of the public documents or parts of the public documents of which they purport to be copies.

Proof of other official documents.

78. The following public documents may be proved as follows:—

(1.) Acts, orders or notifications of the Executive Government of British India in any of its

[1] Notification of Government of India, Separate Revenue, No. 2520, dated 5th April ,1872.

departments, or of any Local Government or any department of any Local Government,

by the records of the departments certified by the heads of those departments respectively,

or by any document purporting to be printed by order of any such Government:

(2.) The proceedings of the Legislatures,

by the journals of those bodies respectively, or by published Acts or abstracts, or by copies purporting to be printed by order of Government:

(3.) Proclamations, orders or regulations issued by Her Majesty or by the Privy Council, or by any department of Her Majesty's Government,

by copies or extracts contained in the *London Gazette*, or purporting to be printed by the Queen's Printer:

(4.) The Acts of the Executive or the proceedings of the Legislature of a foreign country,

by journals published by their authority, or commonly received in that country as such, or by a copy certified under the seal of the country or Sovereign, or by a recognition thereof in some public Act of the Governor-General of India in Council:

(5.) The proceedings of a municipal body in British India,

by a copy of such proceedings certified by the legal keeper thereof, or by a printed book purporting to be published by the authority of such body:

(6.) Public documents of any other class in a foreign country,

by the original, or by a copy certified by the legal keeper thereof, with a certificate under the seal of a notary public or of a British Consul or diplomatic agent, that the copy is duly certified by the officer having the legal custody of the original, and upon proof of the character of the document according to the law of the foreign country.

[In connection with this Section should be read the *Documentary Evidence Act*, 1868—31 Vict. Cap 37, the portions of which concerned with evidence are as follow :—

The Documentary Evidence Act, 1868.

2. *Primâ facie* evidence of any Proclamation, Order, or Regulation issued before or after the passing of this Act by Her Majesty, or by the Privy Council, also of any Proclamation, Order, or Regulation issued before or after the passing of this Act by or under the authority of any such Department of the Government or officer as is mentioned in the first column of the schedule hereto, may be given in all Courts of Justice, and in all legal proceedings whatsoever, in all or any of the modes hereinafter mentioned; that is to say:

(*a.*) By the production of a copy of the *Gazette* purporting to contain such Proclamation, Order, or Regulation.

(*b.*) By the production of a copy of such Proclamation, Order, or Regulation purporting to be printed by the Government Printer, or, where the question arises in a Court in any British Colony or Possession, of a copy purporting to be printed under the authority of the Legislature of such British Colony or Possession.

(*c.*) By the production, in the case of any Proclamation, Order, or Regulation issued by Her Majesty or by the Privy Council, of a copy or extract purporting to be certified to be true by the Clerk of the Privy Council or by any one of the Lords or others of the Privy Council, and, in the case of any Proclamation, Order, or Regulation issued by or under the authority of any of the said Departments or officers, by the production of a copy or extract purporting to be certified to be true by the person or persons specified in the second column of the said schedule in connection with such Department or officer.

Any copy or extract made in pursuance of this Act may be in print or in writing, or partly in print and partly in writing.

No proof shall be required of the handwriting or official position of any person certifying, in pursuance of this Act, to the truth of any copy of or extract from any Proclamation, Order, or Regulation.

3. Subject to any law that may be from time to time made by the Legislature of any British Colony or Possession, this Act shall be in force in every such Colony and Possession.

5. The following words shall in this Act have the meaning hereinafter assigned to them, unless there is something in the context repugnant to such construction; (that is to say,)

Interpretation Clause.

"British Colony and Possession" shall for the purposes of this Act include the Channel Islands, the Isle of Man, and such territories as may for the time being be vested in Her Majesty by virtue of any Act

of Parliament for the Government of India and all other Her Majesty's dominions.

"Legislature" shall signify any authority other than the Imperial Parliament of Her Majesty in Council competent to make laws for any Colony or Possession.

"Privy Council" shall include Her Majesty in Council and the Lords and others of Her Majesty's Privy Council, or any of them, and any Committee of the Privy Council that is not specially named in the schedule hereto.

"Government Printer" shall mean and include the Printer to Her Majesty and any printer purporting to be the printer anthorized to print the Statutes, Ordinances, Acts of State, or other public Acts of the Legislature of any British Colony or Possession, or otherwise to be the Government Printer of such Colony or Possession.

"Gazette" shall include the *London Gazette*, the *Edinburgh Gazette*, and the *Dublin Gazette*, or any of such Gazettes.

6. The provisions of this Act shall be deemed to be in addition to, and not in derogation of, any powers of proving documents given by any existing Statute or existing at Common Law.

SCHEDULE.

COLUMN 1.	COLUMN 2.
NAME OF DEPARTMENT OR OFFICER.	NAMES OF CERTIFYING OFFICERS.
The Commissioners of the Treasury.	Any Commissioner, Secretary, or Assistant Secretary of the Treasury.
The Commissioners for executing the Office of Lord High Admiral.	Any of the Commissioners for executing the Office of Lord High Admiral or either of the Secretaries to the said Commissioners.
Secretaries of State.	Any Secretary or Under-Secretary of State.
Committee of Privy Council for Trade.	Any Member of the Committee of Privy Council for Trade or any Secretary or Assistant Secretary of the said Committee.
The Poor Law Board.	Any Commissioner of the Poor Law Board or any Secretary or Assistant Secretary of the said Board.

As to the proof in England and Ireland of proclamations, treaties and other Acts of State of Foreign States or of British Colonies, and of judgments, decrees, orders and other judicial proceedings of Courts in such States or Colonies, see the 14 & 15 Vict., Cap. 99 (Lord

Broughham's Act), Section 7, *ante*, page 276, *note*, and in connection therewith Section 82, *post*.

Section 12 of the *Naturalization Act*, 1870—33 Vict. Cap. 14, contains the following regulations as to evidence of the declarations, certificates, &c., authorized by the Act :—

Naturalization Act, 1870.

The following regulations shall be made with respect to evidence under this Act :—

(1.) Any declaration authorized to be made under this Act may be proved in any legal proceeding by the production of the original declaration, or of any copy thereof certified to be a true copy by one of Her Majesty's Principal Secretaries of State, or by any person authorized by regulations of one of Her Majesty's Principal Secretaries of State, to give certified copies of such declaration, and the production of such declaration or copy shall be evidence of the person therein named as declarant having made the same at the date in the said declaration mentioned :

(2.) A certificate of naturalization may be proved in any legal proceeding by the production of the original certificate, or of any copy thereof certified to be a true copy by one of Her Majesty's Principal Secretaries of State, or by any person authorized by regulations of one of Her Majesty's Principal Secretaries of State to give certified copies of such certificate.

(3.) A certificate of re-admission to British nationality may be proved in any legal proceeding by the production of the original certificate, or of any copy thereof certified to be a true copy by one of Her Majesty's Principal Secretaries of State, or by any person authorized by regulations of one of Her Majesty's Principal Secretaries of State to give certified copies of such certificate :

(4.) Entries in any register authorized to be made in pursuance of this Act shall be proved by such copies and certified in such manner as may be directed by one of Her Majesty's Principal Secretaries of State, and the copies of such entries shall be evidence of any matters by this Act or by any regulation of the said Secretary of State authorized to be inserted in the register :

(5.) The Documentary Evidence Act, 1868, shall apply to any regulation made by a Secretary of State, in pursuance of or for the purpose of carrying into effect any of the provisions of this Act.

See also Section 10 of the Extradition Act, XI of 1872, *ante*, p. 146. See as to proof by recitals in Statutes, Acts, &c., Section 37, *ante*, page 167. See as to the presumption to be made with respect to seals, signatures, and official character, Section 82, *post*]

PRESUMPTIONS AS TO DOCUMENTS.

Presumption as to genuineness of certified copies.

79. The Court shall presume every document purporting to be a certificate, certified copy, or other document, which is by law declared to be admissible as evidence of any particular fact, and which purports to be duly certified, by any officer in British India, or by any officer in any Native State in alliance with Her Majesty, who is duly authorized thereto by the Governor-General in Council, to be genuine: Provided that such document is substantially in the form and purports to be executed in the manner directed by law in that behalf. The Court shall also presume that any officer, by whom any such document purports to be signed or certified, held, when he signed it, the official character which he claims in such paper.

[This Section applies only to certificates, certified copies, or other documents certified by *officers in British India or by duly authorized officers in allied Native States.* The presumption that the document itself is genuine, of course, includes the presumption that the *signature* and the *seal* (where a seal is used, see Section 76, *ante*, 292) are genuine. The last clause of the Section provides for presumption as to *official character.* For similar presumptions as to similar documents certified by officers other than those above specially designated, see Section 82, *post.*

Having advertence to the definition of "shall presume" (*ante*, page 76), it will be open to the other side to give evidence to show that the certificate, certified copy, or other document is not genuine, or that the officer by whom such document purports to be signed or certified does not hold the official character which he claims in such paper.

For an example of certificates, see Sections 326, 427, and 432 of the Code of Criminal Procedure, Act X of 1872.]

Presumption on production of record of evidence.

80. Whenever any document is produced before any Court purporting to be a record or memorandum of the evidence or of any part of the evidence given by a witness in a judicial proceeding or before any officer authorized by law to take such

evidence, or to be a statement or confession by any prisoner or accused person taken in accordance with law and purporting to be signed by any Judge or Magistrate or by any such officer as aforesaid, the Court shall presume—

that the document is genuine; that any statements, as to the circumstances under which it was taken, purporting to be made by the person signing it, are true, and that such evidence, statement or confession was duly taken.

[If, on a trial for intentionally giving false evidence, a document were produced for the prosecution which purported to be a record of the evidence given by the prisoner, and which was charged to be false, could the Court presume therefrom that the prisoner had, when deposing as a witness, used the very words which appeared in such record, or their vernacular equivalent? The presumption "*that such evidence..... was duly taken*," would, perhaps, warrant this presumption, in which case the Section alters the law as laid down in *The Queen* v. *Fatik Bishwass*, I B. L. R. Crim. Rul. 16. It is to be observed, however, that it would be open to the defence to show that the language used by the prisoner had not been accurately recorded. See the definition of "shall presume," *ante*, page 76. In the case of *Behari Lall Bose and others*, IX W. R. Crim. Rul. 69, it was held that the failure of a Collector to make an English memorandum of the evidence as required by law[1] could not prevent the depositions recorded at full length in the vernacular from being used against a prisoner on his trial for intentionally giving false evidence.

See *ante*, page 114.]

Presumption as to Gazettes.

81. The Court shall presume the genuineness of every document purporting to be the *London Gazette*, or the *Gazette of India*, or the Government Gazette of any Local Government, or of any colony, dependency or possession of the British Crown, or to be a newspaper or journal, or to be a copy of a private Act of Parliament printed by the Queen's Printer, and of every document purporting to be a document directed by any law to be kept by any person, if

[1] See Section 172, Act VIII of 1859.

such document is kept substantially in the form required by law and is produced from proper custody.

[See Section 37, *ante*, page 167, and Section 90, *post;* and as to *private Acts* see *ante*, page 275.]

Presumption as to document admissible in England without proof of seal or signature.

82. When any document is produced to any Court purporting to be a document which, by the law in force for the time being in England or Ireland, would be admissible in proof of any particular in any Court of Justice in England or Ireland without proof of the seal or stamp or signature authenticating it, or of the judicial or official character claimed by the person by whom it purports to be signed, the Court shall presume that such seal, stamp or signature is genuine, and that the person signing it held, at the time when he signed it, the judicial or official character which he claims,

and the document shall be admissible for the same purpose for which it would be admissible in England or Ireland.

[For some documents which would be admissible in Courts of Justice in England or Ireland without proof of seal, signature, or official character, see 33 & 34 Vict, Cap. 52, *ante*, page 147; Section 2 of the Documentary Evidence Act, 1868, *ante*, page 297; and 14 & 15 Vict., Cap. 99, Section 7, *ante*, page 276, *note*.

8 & 9 Vict., Cap. 113.

The 8 & 9 Vict, Cap. 113—The Documentary Evidence Act of 1845—enacts that whenever by any Act now in force or hereafter to be in force, any certificate, official or public document, or document or proceeding of any corporation or joint-stock or other company, or any certified copy of any document, by-law, entry in any register or other book, or of any other proceeding, shall be receivable in evidence of any particular in any Court of Justice, or before any legal tribunal, or either House of Parliament, or any committee of either House or in any judicial proceeding, the same shall respectively be admitted in evidence, provided they respectively *purport* to be sealed or impressed with a stamp, or sealed and signed, or signed alone, as required, or

impressed with a stamp and signed, as directed by the respective Acts made or to be hereafter made, *without any proof of the seal or stamp where a seal or stamp is necessary, or of the signature, or of the official character of the person* appearing to have signed the same and without any further proof thereof in every case in which the original record could have been received in evidence. No proof is required of the seal, signature, or official character of any British Ambassador, Envoy, Minister, Chargé d'Affaires, Secretary of Embassy or of Legation, Consul-General, Consul, *Vice-Consul*, Acting Consul, Pro-Consul or Consular Agent in testimony of any oath, affidavit, affirmation or notorial act having been administered, sworn, affirmed, had or done by or before him.

18 & 19 Vict., Cap. 42, Section 3.

Section 9 of Lord Brougham's Act, 14 and 15 Vict., Cap. 99, enacts that every document which by any law now in force or hereafter to be in force, is, or shall be, admissible in evidence of any particular in any Court of Justice in *England* or *Wales* without proof of the seal or stamp or signature authenticating the same, or of the judicial or official character of the person appearing to have signed the same, shall be admitted in evidence to the same extent and for the same purposes in any Court of Justice in *Ireland*, or before any person having in Ireland, by law or by consent of parties, authority to hear, receive, and examine evidence, *without proof of the seal, or stamp, or signature* authenticating the same, or of the *judicial or official character* of the person appearing to have signed the same. Section 10 contains provisions precisely similar rendering admissible in England or Wales without proof of seal, &c., documents which are so admissible in Ireland. Section 11 further contains similar provisions rendering admissible to the same extent and for the same purposes in the *British colonies* without proof of seal, &c., such documents as are so admissible in England, Ireland, or Wales.]

14 & 15 Vict., Cap. 99, Section 9.

Section 10, *id.*

Section 11, *id.*

83. The Court shall presume that maps or plans purporting to be made by the authority of Government were so made, and are accurate; but maps or plans made for the purposes of any cause must be proved to be accurate.

Proof of maps made for purposes of any cause.

[See *ante*, page 166.]

Presumption as to collections of laws and reports of decisions.

84. The Court shall presume the genuineness of every book purporting to be printed or published under the authority of the Government of any country, and to contain any of the laws of that country,

and of every book purporting to contain reports of decisions of the Courts of such country.

[See Section 38, *ante*, page 169.]

Presumption as to powers-of-attorney.

85. The Court shall presume that every document purporting to be a power-of-attorney, and to have been executed before, and authenticated by a notary public, or any Court, Judge, Magistrate, British Consul or Vice-Consul, or representative of Her Majesty or of the Government of India, was so executed and authenticated.

[See also as to powers-of-attorney, Clause 7 of Section 18, and Section 33 of the Indian Registration Act. Except for registration purposes, there is no presumption as to the genuineness or otherwise of a registered power-of-attorney.

There is, I believe, no law in force in India which requires a Court, Judge, or Magistrate to authenticate the execution of a power-of-attorney.

With respect to Notaries Public, see the 41 Geo. III, Cap. 79 · 3 & 4 Will. IV, Cap 70: 6 & 7 Vict., Cap 90: 6 Geo. IV, Cap. 87 · 18 & 19 Vict., Cap. 42: and 9 Geo IV, Cap. 89 There is in India no law relating to Public Notaries. Such an enactment is much required.]

Presumption as to certified copies of foreign judicial records.

86. The Court may presume that any document purporting to be a certified copy of any judicial record of any country not forming part of Her Majesty's dominions is genuine and accurate, if the document purports to be certified in any manner which is certified by any representative of Her Majesty or of the Government of India resident in such country to be the manner commonly in use in

that country for the certification of copies of judicial records.

[See *ante*, Clause 6, Section 78, page 296, and Section 82, page 302]

Presumption as to books and maps.

87. The Court may presume that any book to which it may refer for information on matters of public or general interest, and that any published map or chart, the statements of which are relevant facts, and which is produced for its inspection, was written and published by the person, and at the time and place, by whom or at which it purports to have been written or published.

[See *ante*, pages 161—166.]

Presumption as to photographs, machine-copies, and telegraphic messages.

88. The Court may presume that a message forwarded from a telegraph office to the person to whom such message purports to be addressed, corresponds with a message delivered for transmission at the office from which the message purports to be sent; but the Court shall not make any presumption as to the person by whom such message was delivered for transmission.

[This Section stood as follows in the original draft of the Bill:—

Presumption as to photographs, machine copies, and telegraphic messages.

"The Court shall presume that photographs, machine copies, and other representations of material things produced by any process affording a reasonable assurance of correctness correctly represent their objects, and that a message forwarded from a telegraph office to the person to whom such message purports to be addressed corresponds with a message delivered, or caused to be delivered, for transmission by the person by whom the message purports to be sent."

The Section itself was altered in committee, but by some oversight the marginal note was left as before.

See Explanation 2 to Section 62, and Clause 2 of Section 63, *ante*, page 281.]

Presumption as to due execution, &c., of documents not produced.

89. The Court shall presume that every document, called for and not produced after notice to produce, was attested, stamped and executed in the manner required by law.

[As to "shall presume," see *ante*, page 76. With this Section read Section 66, *ante*, page 285, and Section 164, *post*.]

Documents thirty years old.

90. Where any document, purporting or proved to be thirty years old, is produced from any custody which the Court in the particular case considers proper, the Court may presume that the signature and every other part of such document which purports to be in the handwriting of any particular person is in that person's handwriting, and, in the case of a document executed or attested, that it was duly executed and attested by the persons by whom it purports to be executed and attested.

Explanation.—Documents are said to be in proper custody if they are in the place in which, and under the care of the person with whom, they would naturally be; but no custody is improper if it is proved to have had a legitimate origin, or if the circumstances of the particular case are such as to render such an origin probable.

This explanation applies also to section eighty-one.

Illustrations.

(*a.*) A has been in possession of landed property, for a long time. He produces from his custody deeds relating to the land showing his titles to it. The custody is proper.

(*b.*) A produces deeds relating to landed property of which he is the mortgagee. The mortgagor is in possession. The custody is proper.

(*c.*) A, a connection of B, produces deeds relating to lands in B's possession, which were deposited with him by B for safe custody. The custody is proper.

["By the term 'ancient documents,' says Mr. Taylor, "are meant documents more than thirty years old; and as these often furnish the only attainable evidence of ancient possession, the law, on the principle of necessity, allows them to be read in Courts of Justice on behalf of persons claiming under them, and against persons in no way privy to them, provided that they are not mere narratives of past events, but that they purport to have formed a part of the act of ownership, exercise of right or other transaction to which they relate. No doubt this species of proof deserves to be scrutinized with care; for first its effect is to benefit those who are connected in interest with the original parties to the documents, and from whose custody they have been produced; and next, the documents are not *proved* but are only *presumed* to have constituted part of the *res gestæ*. Still, as forgery and fraud are, comparatively speaking, of rare occurrence, and as a fabricated deed will generally, from some anachronism or other inconsistency, afford internal evidence of its real character, the danger of admitting these documents is less than might be supposed; and, at any rate, it is deemed more expedient to run some risk of occasional deception than to permit injustice to be done by strict exclusion of what, in many cases, would turn out to be highly material evidence. On a balance, therefore, of evils this kind of proof has, for many years past, been admitted, subject to certain qualifications."[1] It need scarcely be remarked that Mr. Taylor's remarks about forgery and fraud have reference to the state of things in England, and were not intended to apply to India. In the case of *Alaka and others* v. *Kasi Chandra Datta and others* (I W. R. Civ. Rul. 131), it was held by the Calcutta High Court that a páta cannot be taken to be genuine merely from its ancient date, *when there is no evidence of its early existence and publicity*. And in *Gúrú Persad Rai and others* v. *Beikant Chandra Rai and others* (VI W. R. Civ. Rul. 82), it was observed thus:—"There is a rule in the English Law of Evidence, by which, when a document is produced from the proper custody and by the proper person, formal evidence of its execution is dispensed with, if the document be more than thirty years old. But the rule goes no farther, and should the genuineness of the document be for any reason doubtful, it is perfectly open to the Court or jury to reject it, however ancient it may be. Here, assuming the English rule to be applicable to the Courts of this country, the appellants could derive no benefit from it; for, first, not having shown in whose custody the deed had been kept, the rule was not applicable; and, even had this been shown satisfactorily, the Judge had still power to reject the document, if, as in this case, he thought it to be a fabrication."

Reason of the Rule.

Such evidence to be scrutinized.

[1] § 593.

Mr. Philips[1] urges that, in order to render ancient documents admissible, proof of some act done with reference to them, or where the nature of the case does not admit of this, proof of acts of *modern enjoyment*, must be given. Mr. Taylor thinks that the absence of such proof should affect merely the *weight* and not the *admissibility* of the instrument;[2] and this is, no doubt, the view that has been taken by the framers of the Indian Act. The above Section makes documents *purporting* or *proved* to be thirty years old admissible as evidence without proof of execution, attestation, &c.; but the weight to be allowed to them would properly be small, where they were not corroborated by evidence of ancient or modern corresponding enjoyment or by other equivalent or explanatory proof.

On the subject of proper custody, Chief Justice Tindal made the following remarks in the case of *The Bishop of Meath* v. *The Marquis of Winchester*:—[3]

Proper Custody.

"Documents found in a place in which, and under the care of persons with whom, such papers might *naturally and reasonably be expected to be found*, are precisely in the custody which gives authenticity to documents found within it; for *it is not necessary that they should be found in the best and most proper place of deposit.* If documents continue in such custody, there never would be any question as to their authenticity, but it is when documents are found in other than their proper places of deposit that the investigation commences, whether it was reasonable and natural under the circumstances in the particular case to expect that they should have been in the place where they were actually found; for it is obvious that, while there can be only one place of deposit strictly and absolutely proper, there may be many and various that are reasonable and probable, though differing in degree—some being more so, some less—and in those cases the proposition to be determined is, whether the actual custody is so reasonably and probably to be accounted for that it impresses the mind with the conviction that the instrument found in such custody must be genuine. That such is the character and description of the custody, which is held sufficiently genuine to render a document admissible, appears from all the cases." In *Devaji Gayaji* v. *Godabhai Godbhai* (II B. L. R. P. C. 86), the Lords of the Privy Council said:—"With reference to the argument as to the evidence in support of this bond, and particularly with respect to the custody of the bond, it is, in their Lordships' opinion, sufficient to state that the bond was produced in the usual manner by the persons who *claimed title*

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[1] Work on Evidence, 276, 278.

[2] But see *Malcolmson* v. *O'Dea*, 9 Jur. N. S., 1135.

[3] Bingham's New Cases, 200—202.

under the provisions of it, and who therefore were entitled to the possession of it; so that the bond must be held to have come from the proper custody." See also *Mahomed Aizaddí Suha* v. *Shaffí Mula*, VIII B. L. R. 29; and *Gúrú Dass Dey* v. *Sambhúnath Chakravartti*, III B. L. R. 258.

For an exception to the rule, see Section 28, Bengal Reg. II of 1819.]

CHAPTER VI.—OF THE EXCLUSION OF ORAL BY DOCUMENTARY EVIDENCE.

Evidence of terms of written contract.

91. When the terms of a contract, or of a grant, or of any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant or other disposition of property, or of such matter, except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions hereinbefore contained.

Exception 1.—When a public officer is required by law to be appointed in writing, and when it is shown that any particular person has acted as such officer, the writing by which he is appointed need not be proved.

Exception 2.—Wills [admitted to probate in British India][1] may be proved by the Probate.

Explanation 1.—This section applies equally to cases in which the contracts, grants or disposition of property referred to are contained in one document, and to cases in which they are contained in more documents than one.

Explanation 2.—Where there are more originals than one, one original only need be proved.

Explanation 3.—The statement in any document whatever of a fact other than the facts referred to

[1] The words in brackets were substituted for "under the Indian Succession Act" by the amending Act, XVIII of 1872.

in this section, shall not preclude the admission of oral evidence as to the same fact.

Illustrations.

(*a.*) If a contract be contained in several letters, all the letters in which it is contained must be proved.

(*b.*) If a contract is contained in a bill of exchange, the bill of exchange must be proved.

(*c.*) If a bill of exchange is drawn in a set of three, one only need be proved.

(*d.*) A contracts in writing with B for the delivery of indigo upon certain terms. The contract mentions the fact that B had paid A the price of other indigo contracted for verbally on another occasion.

Oral evidence is offered that no payment was made for the other indigo. The evidence is admissible.

(*e.*) A gives B a receipt for money paid by B.

Oral evidence is offered of the payment.

The evidence is admissible.

[Mr. Taylor reduces to *three classes* the cases falling under the rule, which requires the contents of a document to be proved by the document itself, if its production be possible, *viz.*:—

I. Oral evidence cannot be substituted for any *instrument which the law requires to be in writing.*

II. Oral evidence cannot be substituted for the written evidence of any *contract which the parties have put in writing.*

III. Oral evidence cannot be substituted for any writing, *the existence or contents of which are disputed*, and which is *material to the issue* between the parties, and is not merely the memorandum of some other fact.

Class I, where the law requires writing.

The words "*in all cases in which any matter is required by law to be reduced to the form of a document*" in the above Section indicate the first class. Instances of this class in India are: The depositions of witnesses in civil cases (Section 172 of the Civil Procedure Code, Act VIII of 1859), and in criminal cases (Sections 332 to 339 of the Code of Criminal Procedure, Act X of 1872); judgments and decrees in civil cases (Sections 184, 189, 359, and 360 of the Code of Civil Procedure); judgments and final orders of Criminal Courts (Sections 463—464 of the Code of Criminal Procedure); the examinations of accused persons (Section 346, *id*); a promise or acknowledgment which extends the period of limitation (Sections 20—21 of Act IX of

1871); agreements made without consideration (Section 25 of the Indian Contract Act, IX of 1872); contracts for reference to arbitration (Exception 2, Section 28, *id*); and wills[1] (Section 50 of Act X of 1865, extended to Hindús, &c., by Act XXI of 1870). There is no Statute of Frauds in India out of the Presidency Towns:[2] and it may seem that within those limits it applies to European British subjects only (see *John Borradaile and another* v. *Chinsúkh Bakshiram*, I Jur. O. S. 70).

Deposition, &c., informally taken.

Under English law, when the written deposition of a witness or examination of a prisoner has been *informally* recorded, or when it is clearly proved that no writing was made, parol évidence of the statement made by the witness or the prisoner is admissible. The case of an informal deposition appears not to have been provided for in India. The last portion of Section 346 of the Code of Criminal Procedure admits oral evidence of the *statement made by a prisoner*, when the writing is informal. Where no writing at all has been made, it may be argued that oral evidence is admissible, there being no document and such evidence not being therefore in substitution of, or liable to be excluded by, documentary evidence. The words of the Section are, however, not very favorable to this interpretation—"In all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof ..... of such matter, except the document itself, &c."

Class II, where the parties have put the contract in writing.

The second class,—*viz.*, where the parties themselves have put the contract in writing,—is indicated by the words "*When the terms of a contract, or of a grant, or of any other disposition of property, have been reduced to the form of a document, &c.*" "Here," says Mr. Taylor, "the written instrument may be regarded, in some measure, as the ultimate fact to be proved, especially in the case of negotiable securities; and in all cases of written contracts, the writing is tacitly considered by the parties themselves as the only repository and the appropriate evidence of their agreement."[3] And Domat says,[4]—"The force of written proof consists in this: men agree to preserve

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[1] By Section 105 of the Succession Act, *charitable bequests* must not only be in writing, but also, where the testator has a nephew or niece or nearer relative, must have been executed not less than twelve months before his death, and must have been within six months of their execution deposited in a place provided by law for the custody of wills.

[2] The Madras High Court appears to think that the Statute applies to British born subject in the Mofussil, see *Mattya Pillai* v. *Western*, I Mad. Rep. 27.

[3] § 372.

[4] Civil Law, Book 3, Title 6, § 2.

by writing the remembrance of past events, of which they wish to create a memorial, either with the view of laying down a rule for their own guidance, or in order to have in the instrument a lasting proof of the truth of what is written. Thus contracts are written in order to preserve the memorial of what the contracting parties have prescribed for each other to do, and to make for themselves a fixed and immutable law, as to what has been agreed on.....The writing preserves unchanged the matters intrusted to it, and expresses the intention of the parties by their own testimony. The truth of written acts is established by the acts themselves,—that is, *by the inspection of the originals.*" In all proceedings, therefore, civil or criminal, in which the issue depends in any degree upon the *terms* of a contract, the party whose witnesses show that it was reduced to writing must either produce the instrument or show good reason for not doing so (see Section 144, *post*). Thus, for example, in a suit for arrears of rent, if it appear that there was a written agreement, the *rate*[1] of rent can be proved only by producing it or giving secondary evidence of its contents when such evidence is admissible.

Class III, where existence or contents of writing are disputed.

In the *third* place, oral evidence cannot be substituted for any writing *the existence or contents of which are disputed, and which is material to the issue* between the parties, and is not merely the memorandum of some other fact. Thus a witness cannot be asked whether certain statements were published in a newspaper, nor as to the contents of account-books; but the newspaper and the account-books must be produced. This class of cases is sufficiently met by Section 64, *ante*, page 282.

Admissions.

"In stating that oral testimony cannot be substituted for any writing included in either of the three classes above mentioned," says Mr. Taylor, "a tacit exception must be made in favour of the parol admissions of a party, and of his acts amounting to admissions, both of which species of evidence are always received as *primary* proof against himself and those claiming under him, although they relate to the contents of a deed or other instrument, which are directly in issue in the cause" (§ 381). On this point the Indian Evidence Act introduces a stricter rule than has been followed in England, *oral* admissions of the contents of documents not being admissible as primary, but only as secondary evidence (see Section 22, *ante*, page 100). *Written* admissions

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[1] In *Augustien* v. *Challis*, I Exchequer Reports 280, Alderson, B. said—"You may prove by parol the *relation of landlord and tenant*, but without the lease you cannot tell whether any rent was due." This is doubtless law under the Evidence Act in India.

of the existence, condition or contents of a document are admissible under clause (*b*), Section 65, *ante*, page 283, without notice and without proof of loss &c. but they are only *secondary* and not *primary* evidence. Clauses (*a*), (*b*), (*c*), &c. of Section 65 are disjunctive.

The first *Exception* is in accordance with English law. Due appointment may fairly be presumed from acting in an official capacity, it being very unlikely that any one would intrude himself into a public situation which he was not authorized to fill; or that, if he wished, he would be allowed to do so. With reference to *Exception* 2, it was decided in the case of *Brajanath Dey Sircar* v. *S. M. Anandu Mayi Dasi*, VIII B. L. R. 219, that probate of a will granted under Act X of 1865 and Act XXI of 1870 is evidence of the contents of the will against all parties interested thereunder. This decision turned on the interpretation of the Acts just mentioned, and was contrary to the rule previously followed; see *Sharo Bibi* v. *Baldeo Das*, I B. L. R. O. C. 24; and *Srimati Jaikali Debi* v. *Sibnath Chatterji*, II B. L. R. O. C. 1. In the case of probate granted otherwise than under the above Acts, the old rule would have prevailed but for the alteration made by the amending Act and indicated by the brackets. In connection with the subject of wills, may be noticed Section 208 of the Indian Succession Act, X of 1865, under the provisions of which, if a will has been lost or mislaid *since the testator's death*, or has been destroyed by wrong or accident, and not by any act of the testator, probate may be granted of a copy or the draft, if such have been preserved. By Section 209, when the will has been lost or destroyed, and no copy has been made, nor the draft preserved, probate may be granted of its contents, if they can be established by evidence, which, of course, includes oral evidence. Some difficulty may arise in the construction of these Sections owing to the use of the words "since the testator's death" in Section 208, which therefore does not provide for the case of *a will lost or mislaid during the testator's lifetime, a copy or the draft being still in existence.* The loss to which Section 209 refers, is not limited by any restrictive words, and may doubtless be loss during the testator's lifetime or after his death. The result seems to be that if a will be lost or mislaid during the testator's lifetime, and a copy or the draft be preserved, *this* secondary evidence is not admissible to prove the will; but, if there be no copy or draft, oral evidence is admissible: but this result never could have been intended. In the case of *destruction* no difficulty arises, as neither Section contains words restricting the meaning to either before or after the testator's death. Oral or other secondary evidence of a will destroyed during the testator's lifetime without his authority, would, no doubt, be admissible (*Trevelyan* v. *Trevelyan*, I Phill. 149). It may be observed that a will cannot be revoked by *parol* merely, without burning, tearing, &c., (see Section 57, of the Succession Act): and

that parol evidence is inadmissible to show how a revival was intended to operate in cases where it may be doubtful whether the whole or part of a will, which was first partly and then wholly revoked was intended to be revived—see page viii of the Preface to Stokes's Indian Succession Act; Section 60 of the Act, "unless an intention to the contrary shall be shown by the will or codicil;" and 1 Jarman on Wills 135.

As to *Explanation* 1, see Illustration (*a*). The subject of *bought and sold Notes*, may, perhaps, be also referred to in this place. The authorities at English law seem to establish that bought and sold notes constitute the contract when they have been transmitted to the principals, when they agree, and when they have been signed so as to satisfy the Statute of Frauds. Here, it may be said, that all the circumstances indicate it to have been the intention of the parties that the writing should be the actual contract. Whether, when the bought and sold notes disagree materially, resort can be had to the broker's book is a point upon which there has been considerable conflict of opinion. The question here involved is really whether the notes or the book constitute the contract. Where there is no book,[1] or where no writing is required by law, and parol evidence of the contract is offered, the question would similarly appear to be, what constitutes the contract—the notes or the oral agreement? In *Rogers v. Hadley*,[2] Wilde, B. said :—"No doubt the bought and sold notes are *primâ facie* evidence of the contract between the parties, but they are not necessarily the real contract. It is still competent for the defendants to show that they were not the contract. The plaintiff has to prove not only that they were signed, but that they were signed as the contract between the parties." In a recent case, referred by the Calcutta Court of Small Causes to the High Court, the question for decision was whether parol evidence was admissible where there was a variance between bought and sold notes. Couch, C. J. said: "It being stated that the Statute of Frauds does not apply, we are of opinion that the plaintiff was at liberty to prove by parol evidence the existence or terms of a contract on which he could maintain the action. In *Sievewright* v. *Archibald* (17 Q. B. 103) a memorandum in writing of the contract was necessary, as it was within the Statute of Frauds; and Mr. Justice Erle's opinion that the mere delivery of bought and sold notes does not prove an intention to contract in writing, and does not exclude other evidence of the contract in case they disagree, was in accordance with that of the other Judges. Mr. Justice Patteson says: "I consider that the memorandum need not be the contract itself, but that a contract may be made without

Bought and sold Notes.

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[1] It is only in London that brokers are bound to keep books.

[2] 11 Weekly Reporter, 1074.

writing; and if a memorandum in writing be afterwards made, embodying that contract, and be signed by one of the parties or his agent, he being the party to be charged thereby, the Statute is satisfied;" and the ground of his judgment is that where the bought and sold notes are the only writing, and they differ materially, the Statute is not satisfied. Lord Campbell says: 'I by no means say that where there are bought and sold notes, they must necessarily be the only evidence of the contract. Circumstances may be imagined in which they might be used as a memorandum of a parol agreement. ..... What are called the bought and sold notes were sent by him (the broker) to his principals by way of information that he had acted upon their instructions, but not as the actual contract which was to be binding upon them. ..... In the present case there being a material variance between the bought and sold notes, they do not constitute a binding contract; there is no entry in the broker's book signed by him; and if there were a parol agreement, there being no sufficient memorandum of it in writing, nor any part acceptance or part payment, the Statute of Frauds has not been complied with; and I agree with my brother Patteson in thinking that the defendant is entitled to the verdict.'

"There may be a complete binding contract, if the parties intend it, although bought and sold notes are to be exchanged, or a mere formal contract is to be drawn up. This is shown by *Heyworth* v. *Knight* (38 L. J. C. P. 298). If the bought and sold notes do not agree, they cannot be used as evidence of the contract, but we cannot agree with the First Judge that their differing, and not being returned, is positive evidence that, at the conclusion of the negotiation, the parties did not agree, the fact being, as I think, that the negotiation was concluded, and the contract made, before the notes were written, and they were sent by the broker to his principals by way of information. To support the opinion of the First Judge, it would be necessary that there should exist a custom between merchants that they should not be bound until regular bought and sold notes have been exchanged." *Howard Clayton* v. *D. N. Shaw, Englishman Newspaper of* 14*th September* 1872.[1]

As to *Explanation* 2, see Explanations 1 and 2, Section 62, *ante*, pages 280, 281. In connection with *Explanation* 3, read Illustrations (*d*) and (*e*). In the first case here put, the incidental mention of what was done on another occasion had nothing to say to the *terms* of the contract embodied in writing. In the second case, the writing was merely a memorandum of the fact of payment. It may be useful to give a few more examples, it being more difficult to determine when the writing may be dispensed with than when it must be produced. If, during an employment under a written contract to repair the inside of a house,

[1] See also Taylor, §§ 390—393.

an order be given verbally for additional and distinct repairs or work on the outside of the house, for example, the writing need not be produced in an action to recover for the latter. If the fact of the occupation of land be alone in issue without respect to the terms of the tenancy, this fact may be proved by parol evidence, such as payment of rent or by the evidence of a witness, who has seen the tenant occupy, notwithstanding that the occupancy be under a written agreement. Partnership may be proved by parol evidence of the acts of the parties without producing the written deed of partnership. So the fact of birth, baptism, marriage, death, or burial may be proved by oral testimony notwithstanding the existence of registers of these occurrences; for, says Mr. Taylor, these registers form no part of the fact to be proved, and the entry is no more than a collateral or subsequent memorial of that fact.]

Exclusion of evidence of oral agreement.

92. When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to the last section, no evidence of any oral agreement or statement shall be admitted as between the parties to any such instrument or their representatives in interest, for the purpose of contradicting, varying, adding to, or subtracting from, its terms.

Proviso (1).—Any fact may be proved which would invalidate any document, or which would entitle any person to any decree or order relating thereto; such as fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, want [or][1] failure of consideration, or mistake in fact or law.

Proviso (2).—The existence of any separate oral agreement as to any matter on which a document is silent, and which is not inconsistent with its terms, may be proved. In considering whether or not this proviso applies, the Court shall have regard to the degree of formality of the document.

Proviso (3.)—The existence of any separate oral agreement constituting a condition precedent to the

[1] The word in brackets was substituted for "of" by Section 8 of the amending Act, XVIII of 1872.

attaching of any obligation under any such contract, grant or disposition of property, may be proved.

Proviso (4).—The existence of any distinct subsequent oral agreement to rescind or modify any such contract, grant or disposition of property, may be proved, except in cases in which such contract, grant or disposition of property is by law required to be in writing, or has been registered according to the law in force for the time being as to the registration of documents.

Proviso (5).—Any usage or custom by which incidents, not expressly mentioned in any contract, are usually annexed to contracts of that description, may be proved ; provided that the annexing of such incident would not be repugnant to, or inconsistent with, the express terms of the contract.

Proviso (6).—Any fact may be proved which shows in what manner the language of a document is related to existing facts.

Illustrations.

(*a.*) A policy of insurance is effected on goods "in ships from Calcutta to London." The goods are shipped in a particular ship which is lost. The fact that that particular ship was orally excepted from the policy, cannot be proved.

(*b.*) A agrees abolutely in writing to pay B Rs. 1,000 on the 1st March 1873. The fact that at the same time an oral agreement was made that the money should not be paid till the 31st March, cannot be proved.

(*c.*) An estate called 'the Rámpur tea estate' is sold by a deed which contains a map of the property sold. The fact that land not included in the map had always been regarded as part of the estate and was meant to pass by the deed, cannot be proved.

(*d.*) A enters into a written contract with B to work certain mines, the property of B, upon certain terms. A was induced to do so by a misrepresentation of B's as to their value. This fact may be proved.

(*e.*) A institutes a suit againt B for the specific performance of a contract, and also prays that the contract

may be reformed as to one of its provisions, as that provision was inserted in it by mistake. A may prove that such a mistake was made as would by law entitle him to have the contract reformed.

(*f.*) A orders goods of B by a letter in which nothing is said as to the time of payment, and accepts the goods on delivery. B sues A for the price. A may show that the goods were supplied on credit for a term still unexpired.

(*g.*) A sells B a horse, and verbally warrants him sound. A gives B a paper in these words: 'Bought of A a horse for Rs. 500.' B may prove the verbal warranty.

(*h.*) A hires lodgings of B, and gives B a card on which is written—'Rooms, Rs. 200 a month.' A may prove a verbal argeement that these terms were to include partial board.

A hires lodgings of B for a year, and a regularly stamped agreement drawn up by an attorney is made between them. It is silent on the subject of board. A may not prove that board was included in the terms verbally.

(*i.*) A applies to B for a debt due to A by sending a receipt for the money. B keeps the receipt and does not send the money. In a suit for the amount, A may prove this.

[See Illustration (*e*), Section 91, *ante*, page 310.]

(*j.*) A and B make a contract in writing to take effect upon the happening of a certain contingency. The writing is left with B, who sues A upon it. A may show the circumstances under which it was delivered.

[The language of this Section is not very exact. The words "*No evidence of any oral agreement or statement shall be admitted as between the parties to any such instrument, &c.,*" correspond with and have clear reference to the words "*contract, grant, or other disposition of property*" in the beginning of the Section; but their application to "*any matter required by law to be reduced to the form of a document*" is not so evident. If the matter required by law to be reduced to writing be a deposition, for example, evidence of an oral statement is admissible for the purpose of contradicting the writing in cases other than those included in the provisoes that follow. See *ante*, page 76, as to the words "shall presume" in Section 80: and see Illustrations (*a*) and (*b*) to Section 121, *post*.

Oral evidence to contradict, vary, add to, or subtract from the terms of the writing, is excluded only as *between the parties to the instrument or their representatives in interest.* Other persons may give evidence of any facts tending to show a contemporaneous agreement varying the terms of the document (Section 99, *post*). But can such persons give evidence to *contradict, add to, or subtract from* the writing? If Section 99 had not been inserted in the Act, this evidence would clearly be admissible, inasmuch as Section 92 excludes it only as *between parties*, &c.: but it may be said that the use of "*varying*" only in Section 99 and the omission of "*contradicting, adding to, or subtracting from*" point to the admission of oral evidence when tendered by persons not parties in the case expressed, and to its exclusion in the cases omitted—*Expressio unius personæ, vel rei, est exclusio alterius.*

Persons not Parties may give oral evidence.

Illustrations (*a*), (*b*), and (*c*) afford instances of oral evidence which would contradict the writing, and which would therefore be inadmissible.

The rule that *parol testimony cannot be received to contradict, vary, add to, or subtract from, the terms of a valid written instrument*, is founded on the obvious inconvenience and injustice that would result if matters in writing, made by advice and on consideration, and intended finally to embody the entire agreement between the parties, were liable to be controlled by what Lord Coke expressively calls *the uncertain testimony of slippery memory.* So Starkie says,—"It is likewise a general and most inflexible rule that, wherever written instruments are appointed either by the requirements of the law, or *by the compact of parties*, to be the repositories and memorials of truth, any other evidence is excluded from being used either as a substitute for such instruments, or to contradict or alter them. This is a matter both of principal and policy: of *principle*, because such instruments are in their nature and origin entitled to a much higher degree of credit than parol evidence: *of policy*, because it would be attended with great mischief, if those instruments upon which men's rights depended were liable to be impeached by *loose collateral evidence.* . . . . . Where the terms of an agreement are reduced to writing, the document itself, being constituted by the parties as the expositor of their intentions, is the only instrument of evidence in respect of that agreement which the law will recognize, so long as it exists for the purposes of evidence."

Reasons for excluding oral evidence.

This rule is, however, not infringed by the admission of parol evidence under the proper plea to show that the instrument is altogether void,

or that it *never* had any legal existence or binding force either by reason of forgery or *fraud*, or for the *illegality* of the subject-matter, or for a want of due execution and delivery: or to show that the writing was obtained by duress, or that the party was incapable of binding himself by reason of some legal impediment, such as infancy, coverture, idiotcy, insanity, or intoxication. The want or failure of consideration may also be proved by parol, and if no consideration is stated, one may be proved by extrinsic oral evidence. "The same general rule prevails in equity, as at law," says Mr. Story,[1] "that parol evidence is not admissible to contradict, qualify, extend, or vary written instruments: and that the interpretation of them must depend upon their own terms. But in cases of *accident*, *mistake*, or *fraud*, Courts of Equity are constantly in the habit of admitting parol evidence to qualify and correct, and even to defeat, the terms of written instruments." These and other exceptions to the rule are embodied in the *provisoes* to the Section, of which more afterwards.

Exceptions to the rule.

There was a course of decisions in Bengal which seemed more or less to favour the position that oral evidence could be admitted to show that an instrument purporting on the face of it to be a deed of absolute sale, was really intended by the parties to operate as a mortgage merely, in consequence of there being a contemporaneous oral agreement that the property should be reconveyed on repayment with interest of the money which formed the consideration for the conveyance. How far this view was really warranted by the cases relied on in support of it, is now immaterial, as the law is no longer doubtful. It will, however, be useful to refer to the case (*Kashinath Chakravartti* v. *Chandi Charan Bunnerji*, V W. R. Civ. Rul. 68) which finally settled the law and established the view which has been followed by the framers of the Indian Evidence Act. Peacock, C. J., in whose opinion the majority of the Full Bench concurred, said:—"I am of opinion that verbal evidence is *not admissible to vary or alter the terms of a written contract in cases in which there is no fraud or mistake, and in which the parties intend to express in writing what their words import.* If a man writes that he sells absolutely, intending the writing which he executes to express and convey the meaning, that he intends to sell absolutely, he cannot by mere verbal evidence show that, at the time of the agreement, both parties intended that their contract should not be such as their written words express, but that which they expressed by their words to be an absolute sale should be a mortgage. It is said that there is no Statute of Frauds, and therefore parties may enter into verbal contracts for the sale of lands in the

Conveyances in Bengal alleged to have been intended to operate as mortgages merely.

[1] Equity Jurisprudence, Vol. II, page 750, § 1531.

mofussil without writing. . . . . But, admitting that the law allows sales of land or other contracts relating to land to be made verbally, it does not follow that, if the parties choose to reduce their contract into writing, they can bring forward mere verbal evidence to contradict the writing, and to show that they intended something different from that which the writing expresses, and was intended to express. . . . . Without holding that every rule of the English Law of Evidence is to be applied to transactions in the mofussil, I have no hesitation in saying that a rule of evidence, allowing a contract expressed in writing in words which the parties intended to use, and of which they knew the import could be varied by mere verbal evidence that the parties did not intend that which they expressed in writing but something very different, would lead to the grossest fraud, and would open the widest door to perjury in support of fraud. . . . . If mere verbal evidence is admissible in this case to contradict a written contract, it would apply to every other case; and a man who writes "*one thousand*" intending to write "*one thousand*" might prove that by a verbal agreement, the words "*one thousand*" were not intended to mean "*one thousand*" but only "*one hundred.* Nothing could be more dangerous than the admission of such evidence. Further, if it be held that such evidence is admissible, *the whole effect of the new Registration Act would be frustrated.* If an absolute deed of sale of land is registered, it could not be controlled or proved to be conditional by an unregistered *ekrarnamah*, because both are instruments relating to land within the meaning of Act XVI of 1864, Section 13; but a mere verbal contract would not be an instrument within the meaning of that Section. If an absolute deed of sale could be controlled or modified by a contemporaneous verbal agreement, showing that it was intended to be a mortgage, an absolute deed of sale of land registered could be modified by an unregistered verbal agreement, as a verbal agreement cannot and is not required to be registered. This does not necessarily show what the law is; but it behoves us, in deciding this case, not to admit a principle which must necessarily lead to such results, unless we find it clearly and unequivocally established . . . . . I do not know that the Hindú or Mahomedan law allows a written document to be altered by contemporaneous verbal statements. It is unnecessary to enter into that question here. It is sufficient to say that, if they did, we are not bound by the Mahomedan or Hindú rules of evidence, and that they were far more stringent than ours. . . . . The plaintiff in the present case alleged that he took possession in 1266, and that in 1270 the defendant forcibly dispossessed him. The defendant says that plaintiff never took possession, and that he was never forcibly ousted. If possession did not accompany or follow the absolute bill of

sale, it would be a strong fact to show that the transaction was a mortgage and not a sale; and it, therefore, becomes material to try whether the plaintiff was ever in possession, and forcibly dispossessed, as alleged by him, and whether, having reference to the amount of the alleged purchase-money advanced, and to the value of the interest alleged to be sold, *and the acts and conduct of the parties*, they intended to act upon the deed as an absolute sale, or to treat the transaction as a mortgage only: for I am of opinion that *parol evidence is admissible to explain the acts of the parties:* as for example, to show why the plaintiff did not take possession in pursuance of the bill of sale, if it be found that the defendant retained possession, and that the plaintiff never had possession, as alleged by him, and was never forcibly dispossessed." The case was accordingly remanded to the Lower Court that it might consider certain acts and conduct of the parties, and with reference to them determine whether the transaction was an absolute sale or a mortgage. With reference to this order it was observed in a subsequent case that there may be some difficulty in comprehending the distinction between the admissibility of evidence of a verbal contract to vary a written instrument, and the admissibility of evidence showing the acts of the parties, which, after all, are only indications of such unexpressed unwritten agreement between the parties (*Madhub Chandra Rai* v. *Gangadhur Samant*, III B. L. R. 86). It may, however, be that this evidence of conduct was admitted not so much to vary or contradict the written instrument as to show that the parties had mutually *waived* the contract as embodied in writing. The report shows that a considerable period had elapsed, and that several transactions had taken place between the execution of the writing and the suit brought.—See also the principle discussed in *Phelú Maní Dasí* v. *Girish Chandra Bhuttacharjya and others*, VIII W. R. Civ. Rul. 515: *Bholanath Khettrí* v. *Kalí Persad Agarwala*, VIII B. L. R. 91: *Mutí Lal Seal* v. *Anand Chandra Sandel*, V Moo. Ind. Ap. 72: *Shah Mukhun Lal* v. *Sri Krishna Singh*, II B. L. R. P. C. 48: and *Mussamat Ram Dey Koer* v. *Babú Bishen Dyal Singh*, VIII W. R. Civ. Rul. 339. In connection with *Proviso* (1) should be read Illustrations (*d*) and (*e*). The latter is important as throwing light on the words "*or which would entitle any person to any decree or order relating thereto.*" Where neither party to the contract is in error as to the matters in respect of which they are contracting, but there is an error in the reduction of the contract into writing common to both parties, there the Court interferes for the purpose of *re-forming* the contract and not of rescinding it.[1] As to *mistake*, see also Sections 20, 21, and 22 of the Indian Contract Act, IX of 1872: and *Babú Dhunput Singh Dugar Rai Bahadúr* v. *Sheikh Jawahir Ali*,

[1] Fry on Specific Performance, page 222, § 500.

VIII W. R. Civ. Rul. 152, a case to be distinguished from Illustration (*c*). As to *fraud*, see Section 17, read with Sections 14 and 19 of the Indian Contract Act: Section 48 of the Indian Succession Act, X of 1865: *Manohar Das and others* v. *Bhagabatí Dasí*, I B. L. R. O. C. 29 (Fraud on a *parda nishín* lady): *Mathura Pandey* v. *Ram Rucha Tewarí*, III B. L. R. Civ. Rul. 108: and *Shah Makhan Lal* v. *Srikrishna Singh*, II B. L. R. P. C. 49 (A party cannot show true nature of transaction by proof of fraud for his own relief, and insist on its apparent character to prejudice his adversary—cannot approbate and reprobate). As to *intimidation*, see Section 15 of the Indian Contract Act and Section 48 of the Indian Succession Act.

As to *illegality*, see Sections 23 and 24 of the Indian Contract Act; Section 114 of the Indian Succession Act; and Section 43 of the Indian Penal Code. As to *want of capacity*, see Sections 11 and 12 of the Indian Contract Act. As to *want or failure of consideration*, see Section 25 of the Indian Contract Act: Illustration (*i*) below: and *Mussamut Ramdí Kunwarí and another* v. *Babú Sibdiyal Singh*, VII W. R. Civ. Rul. 334, which case is no longer law.

With *Proviso* (2) should be read Illustrations (*f*), (*g*), and (*h*). The last exemplifies *formality* and the absence thereof. See also *Mohan Lall Rai* v. *Ürnapurna Dásí and others*, IX W. R. Civ. Rul. 567, in which oral evidence was admitted to show the boundaries of land let under a *pàtá* which contained no boundaries.

With *Proviso* (3) read Illustration (*j*). An *escrow* is a writing deposited with a third person to be by him delivered to the person whom it purports to benefit upon the performance of some condition upon which only the writing is to have effect. In *Shah Mahsam Alí and others* v. *Balasú Koer* (Hay's Rep. 577), it was held that, where a deed of sale of a portion of an estate was delivered *to the party in whose favour it had been executed*, evidence could not be admitted to show that it was intended to operate as an escrow only, as might have been the case had it been delivered to a *third party*. The report of this case is not very clear, and the decision would seem not to be in accordance with *Pym* v. *Campbell*, 25 Law Journal, Q. B. 277; and *Davis* v. *Jones*, 17 Com. Bench Rep. 625, which are followed in the above *Proviso*.

Escrow.

Proviso (4) alters the law as stated in *Kashínath Chakravartí* v. *Chand Charan Banerjí* (*ante*, page 320), and by Lord Denman in *Goss* v. *Lord Nugent*,[1] who said:—"After an agreement has been reduced into writing, it is competent to the parties, at any time before breach of it, *by a new contract not in writing*, either altogether to waive, dissolve, or annul the former agreement, or in any manner to add to, or subtract

[1] 5 Barnwall and Adolphus' Reports, 65.

from, or vary, or qualify the terms of it, and thus to make a new contract, which is to be proved partly by the written agreement, and partly by the subsequent verbal terms engrafted upon what will be thus left of the written agreement." Where writing is by Statute required for the new contract, of course it must be in writing. But where writing is not required for the *new contract*, the mere fact of its being necessary for the *old contract* rescinded or modified will not necessitate the new contract being written. Under the above proviso, however, the new contract cannot be a verbal one in cases in which the old contract (1) is by law required to be in writing, or (2) has been registered.—*Nihil tam conveniens est naturali æquitati quam unum quodque dissolvi eo ligamine quo ligatum est.*[1]

Proviso (5).—This rule of annexing incidents by parol is generally applied in mercantile or other dealings, in which *known usages* prevail with reference to which the parties are presumed to have contracted. It also rests on the presumption that the parties did not intend to express in writing the whole of the agreement by which they were to be bound, but only to make their contract with reference to the established usages and customs relating to the subject-matter. If, therefore, the written contract deal with the subject of the usage or custom, parol evidence will be inadmissible, as this would vary or alter the writing. With reference to usage or custom, see *ante*, pages 87—88, 127—128: *Jago Mohan Ghose* v. *Kaisrichand*, IX Moo. Ind. Ap. 256 (Neither by the English nor the Hindú law, unless there be mercantile usage, can *interest* be imported into a contract which contains no stipulation to that effect): *Kunj Behárí Patak* v. *Shiva Balak Singh*, I N-W-P. Rep. Full Bench, 119 (Custom of digging wells, &c.): *The Bank of Hindústan, China, and Japan* v. *Sedgwick and Bulkly*, I Jur. N. S. 107 (Promissory Note—Stamp—Usage): *Indar Chandra Dúgar* v. *Lachmí Bibí*, VII B. L. R. 682 (Evidence of custom as to hundí excluded by express terms of writing): *Macfarlane and others* v. *Carr and others*, VIII B. L. R. 459 (Custom at variance with contract): and *Harí Mohan Beisakh and another* v. *Krishno Mohan Beisakh and another*, IX B. L. R. Appen. 1 (Hundí—Local Custom at Dacca).

With reference to the use and value of this evidence, the following observations of Mr. Justice Story are valuable:—"I own myself no friend to the almost indiscriminate habit of late years, of setting up particular usages or customs in almost all kinds of business and trade to control, vary, or annul the general liabilities of parties under the common law as well as under the commercial law. It has long appeared to me that there is no small danger in admitting such loose and incon-

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[1] "Nothing is so agreeable to natural equity as that by the like means by which anything is bound it be loosed."

clusive usages and customs, often unknown to particular parties, and always liable to great misunderstandings and misrepresentations and abuses, to outweigh the well-known and well-selected principles of law. And I rejoice to find that, of late years, the Courts of Law, both in England and in America, have been disposed to narrow the limits of the operation of such usages and customs and to discountenance any further extension of them. *The true and appropriate office of a usage or custom is to interpret the otherwise indeterminate intentions of parties, and to ascertain the nature and extent of their contracts, arising not from express stipulations, but from mere implications and presumptions and acts of a doubtful or equivocal character.* It may also be admitted to ascertain the true meaning of a particular word or of particular words in a given instrument, when the word or words have various senses, some common, some qualified, and some technical, according to the subject-matter to which they are applied." (See Section 98, *post.*) "But I apprehend that it can never be proper to resort to any usage or custom to control or vary the positive stipulations in a written contract, and, *à fortiori*, not in order to contradict them. An express contract of the parties is always admissible to supersede, or vary, or control a usage or custom; for the latter may always be waived at the will of the parties. But a written and express contract cannot be controlled, or varied, or contradicted by a usage or custom; for that would be not only to admit parol evidence to control, vary, or contradict written contracts, but it would be to allow mere presumptions and implications, properly arising in the absence of any positive expressions of intention to control, vary, or contradict the most formal and deliberate declarations of the parties." The Indian Evidence Act adopts the principles here advocated.

As to *Proviso* (6), if a man purchase "the Rámpur estate" or "Mr. Smith's house in Calcutta," or "the steamer Hindustan" or "the race-horse Jupiter," without further words of description, oral evidence alone can show the particular thing sold and purchased.]

Exclusion of evidence to explain or amend ambiguous document.

93. When the language used in a document is, on its face, ambiguous or defective, evidence may not be given of facts which would show its meaning or supply its defects.

Illustrations.

(*a.*) A agrees in writing to sell a horse to B for 'Rs. 1,000 or Rs. 1,500.'

Evidence cannot be given to show which price was to be given.

(*b.*) A deed contains blanks. Evidence cannot be given of facts which would show how they were meant to be filled.

[This is what has been known from the time of Lord Coke as a *patent ambiguity* or an ambiguity apparent on the face of the instrument as distinguished from a *latent ambiguity*, which, non-apparent on the face of the instrument, comes to light only when the language of the writing is sought to be applied to existing facts. So agreements, the meaning of which is not certain or capable of being made certain, are void, Section 29 of the Indian Contract Act, IX of 1872.]

Exclusion of evidence against application of document to existing facts.

94. When language used in a document is plain in itself, and when it applies accurately to existing facts, evidence may not be given to show that it was not meant to apply to such facts.

Illustration.

A sells to B by deed 'my estate at Rámpur containing 100 bíghás.' A has an estate at Rámpur containing 100 bíghás. Evidence may not be given of the fact that the estate meant to be sold was one situated at a different place and of a different size.

[Such evidence, if admitted, would contradict the writing.]

Evidence as to document unmeaning in reference to existing facts.

95. When language used in a document is plain in itself, but is unmeaning in reference to existing facts, evidence may be given to show that it was used in a peculiar sense.

Illustration.

A sells to B by deed 'my house in Calcutta.'

A had no house in Calcutta, but it appears that he had a house at Howrah, of which B had been in possession since the execution of the deed.

These facts may be proved to show that the deed related to the house at Howrah.

[The legal maxim is—*Falsa demonstratio non nocet*—a false description does not vitiate the document: and the principle is, that so much

of the description as has no application being laid aside as mere surplusage, what remains is sufficient to identify the thing really meant. The words "in Calcutta" in the Illustration have no application. The words "my house" have application, when it is shown that A had a house at Howrah. This is a case of *latent ambiguity*.]

Evidence as to application of language which can apply to one only of several persons.

96. When the facts are such that the language used might have been meant to apply to any one, and could not have been meant to apply to more than one, of several persons or things, evidence may be given of facts which show which of those persons or things it was intended to apply to.

Illustrations.

(*a.*) A agrees to sell to B for Rs. 1,000 "my white horse." A has two white horses. Evidence may be given of facts which show which of them was meant.

(*b.*) A agrees to accompany B to Hyderábád. Evidence may be given of facts showing whether Hyderábád in the Deccan or Hyderabad in Sindh was meant.

[This also is a case of latent ambiguity.]

Evidence as to application of language to one of two sets of facts to neither of which the whole correctly applies.

97. When the language used applies partly to one set of existing facts, and partly to another set of existing facts, but the whole of it does not apply correctly to either, evidence may be given to show to which of the two it was meant to apply.

Illustration.

A agrees to sell to B 'my land at X in the occupation of Y.' A has land at X, but not in the occupation of Y, and he has land in the occupation of Y, but it is not at X. Evidence may be given of facts showing which he meant to sell.

[This is another case of *latent ambiguity*.

English Law.

Mr. Taylor collects from the cases decided under English law the following rules:—*First*, where, in a written instrument, the description of the person or thing intended is *applicable with legal certainty to each of several*

subjects, extrinsic evidence, including proof of declarations of intention, is admissible to establish which of such subjects was intended by the author. *Secondly*, if the description of the person or thing be *partly applicable and partly inapplicable to each of several subjects*, though extrinsic evidence of the surrounding circumstances may be received for the purpose of ascertaining to which of such subjects the language appliës, yet evidence of the author's declarations of intention will be inadmissible. *Thirdly*, if the *description be partly correct and partly incorrect*, and the correct part be sufficient of itself to enable the Court to identify the subject intended, while the incorrect part is inapplicable to any subject, parol evidence will be admissible to the same extent as in the last case, and the instrument will be rendered operative by neglecting the erroneous statement. *Fourthly*, if the description be wholly inapplicable to the subject intended, or said to be intended by it, evidence cannot be received to prove whom or what the author really intended to describe. *Fifthly*, if the language of a written instrument, when interpreted according to its primary meaning, be insensible with reference to extrinsic circumstances, collateral facts may be resorted to in order to show that in some secondary sense of the words, and in one in which the author meant to use them, the instrument may have a full effect." (§ 1109.) Rule I, here given, correspond with Section 96: Rule II with Section 97: Rules III and V with Section 95: and Rule IV with Section 94: while no distinction appears to be made in any case between *declarations of intention* and other evidence.]

Evidence as to meaning of illegible characters, &c.

98. Evidence may be given to show the meaning of illegible or not commonly intelligible characters, of foreign, obsolete, technical, local, and provincial expressions, of abbreviations and of words used in a peculiar sense.

Illustration.

A, a sculptor, agrees to sell to B 'all my mods.' A has both models and modelling tools. Evidence may be given to show which he meant to sell.

[In connection with this Section, see the penultimate clause of Section 49, *ante*, page 247. The Illustration is the case of *Goblet* v. *Beechey*, 3 Simons's Chancery Reports, 24, where it was held that models were meant.]

Who may give evidence of agreement varying terms of document.

99. Persons who are not parties to a document, or their representatives in interest, may give evidence of any facts tending to show a contemporaneous agreement varying the terms of the document.

Illustration.

A and B make a contract in writing that B shall sell certain cotton, to be paid for on delivery. At the same time they make an oral agreement that three months' credit shall be given to A. This could not be shown as between A and B, but it might be shown by C if it affected his interests.

[*Query*—Was the use of the term "varying" only intended to exclude evidence *contradicting* &c. ?]

Saving of provisions of Indian Succession Act relating to wills.

100. Nothing in this chapter contained shall be taken to affect any of the provisions of the Indian Succession Act (X of 1865) as to the construction of Wills.

[The provisions of the Indian Succession Act as to the construction of Wills are contained in Part XI, Sections 61 to 98, inclusive, and are as follow:—

Of the Construction of Wills.

Wording of Will.

61. It is not necessary that any technical words or terms of art shall be used in a Will, but only that the wording shall be such that the intentions of the testator can be known therefrom.

Enquiries to determine questions as to object or subject of Will.

62. For the purpose of determining questions as to what person or what property is denoted by any words used in a Will, a Court must inquire into every material fact relating to the persons who claim to be interested under such Will, the property which is claimed as the subject of disposition, the circumstances of the testator and of his family, and into every fact a knowledge of which may conduce to the right application of the words which the testator has used.

Illustrations.

(*a*) A, by his Will, bequeaths 1,000 rupees to his eldest son, or to his youngest grandchild, or to his cousin Mary. A Court may make inquiry in order to ascertain to what person the description in the Will applies.

(*b*) A by his Will leaves to B "his estate called Black Acre." It may be necessary to take evidence in order to ascertain what is the subject-matter of the b quest; that is to say, what estate of the testator's is called Black Acre.

(*c*) A, by his Will, leaves to B "the estate which he purchased of C." It may be necessary to take evidence in order to ascertain what estate the testator purchased of C.

Misnomer or misdescription of object.

63. Where the words used in the Will to designate or describe a legatee, or a class of legatees, sufficiently show what is meant, an error in the name or description shall not prevent the legacy from taking effect. A mistake in the name of a legatee may be corrected by a description of him, and a mistake in the description of a legatee may be corrected by the name.

Illustrations.

(*a*) A bequeaths a legacy "to Thomas, the second son of his brother John." The testator has an only brother named John, who has no son named Thomas, but has a second son, whose name is William. William shall have the legacy.

(*b*) A bequeaths a legacy "to Thomas, the second son of his brother John." The testator has an only brother named John, whose first son is named Thomas, and whose second son is named William. Thomas shall have the legacy.

(*c*) The testator bequeaths his property "to A and B, the legitimate children of C." C has no legitimate child, but has two illegitimate children. A and B. The bequest to A and B takes effect, although they are illegitimate.

(*d*) The testator gives his residuary estate to be divided among "his seven children," and proceeding to enumerate them, mentions six names only. This omission shall not prevent the seventh child from taking a share with the others.

(*e*) The testator having six grandchildren, makes a bequest to "his six grandchildren," and proceeding to mention them by their Christian names mentions one twice over, omitting another altogether. The one whose name is not mentioned shall take a share with the others.

(*f*) The testator bequeaths "1,000 rupees to each of the three children of A." At the date of the Will, A has four children. Each of these four children shall, if he survives the testator, receive a legacy of 1,000 rupees.

When words may be supplied.

64. Where any word material to the full expression of the meaning has been omitted, it may be supplied by the context.

Illustration.

The testator gives a legacy of "five hundred" to his daughter A, and a legacy of "five hundred rupees" to his daughter B. A shall take a legacy of five hundred rupees.

Rejection of erroneous particulars in description of subject.

65. If the thing which the testator intended to bequeath can be sufficiently identified from the description of it given in the Will, but some parts of the description do not apply, such parts of the description shall be rejected as erroneous, and the bequest shall take effect.

Illustrations.

(*a*) A bequeaths to B "his marsh lands lying in L, and in the occupation of X." The testator had marsh lands lying in L, but no marsh lands in the occupation of X. The words "in the occupation of X" shall be rejected as erroneous, and the marsh lands of the testator lying in L shall pass by the bequest.

(*b*) The testator bequeaths to A "his zamíndárí of Rampore." He had an estate at Rampore, but it was a taluk and not a zamíndárí. The taluk passes by this bequest.

When part of description may not be rejected as erroneous.

66. If the Will mentions several circumstances as descriptive of the thing which the testator intends to bequeath, and there is any property of his in respect of which all those circumstances exist, the bequest shall be considered as limited to such property, and it shall not be lawful to reject any part of the description as erroneous, because the testator had other property to which such part of the description does not apply.

Explanation.—In judging whether a case falls within the meaning of this Section, any words which would be liable to rejection under the sixty-fifth Section are to be considered as struck out of the Will.

Illustrations.

(*a*) A bequeaths to B "his marsh lands lying in L, and in the occupation of X." The testator had marsh lands lying in L, some of which were in the occupation of X, and some not in the occupation of X. The bequest shall be considered as limited to such of the testator's marsh lands lying in L as were in the occupation of X.

(*b*) A bequeaths to B "his marsh lands lying in L, and in the occupation of X, comprising 1,000 bíghás of land." The testator had marsh lands lying in L, some of which were in the occupation of X, and some not in the occupation of X. The measurement is wholly inapplicable to the marsh lands of either class, or to the whole taken together. The measurement shall be considered as struck out of the Will, and such of the testator's marsh lands lying in L, as were in the occupation of X, shall alone pass by the bequest.

Extrinsic evidence admissible in case of latent ambiguity.

67. Where the words of the Will are unambiguous, but it is found by extrinsic evidence that they admit of applications, one only of which can have been intended by the testator, extrinsic evidence may be taken to show which of these applications was intended.

Illustrations.

(*a*) A man having two cousins of the name of Mary, bequeaths a sum of money to "his cousin Mary." It appears that there are two persons, each answering the description in the Will. That description, therefore, admits of two applications, only one of which can have been intended by the testator. Evidence is admissible to show which of the two applications was intended.

(*b*) A, by his Will, leaves to B "his estate called Sultánpur Khurd." It turns out that he had two estates called Sultánpur Khurd. Evidence is admissible to show which estate was intended.

Extrinsic evidence inadmissible in cases of patent ambiguity or deficiency.

68. Where there is an ambiguity or deficiency on the face of the Will, no extrinsic evidence as to the intentions of the testator shall be admitted.

Illustrations.

(*a*) A man has an aunt Caroline and a cousin Mary, and has no aunt of the name of Mary. By his Will he bequeaths 1,000 rupees to "his aunt Caroline" and 1,000 rupees to "his cousin Mary," and afterwards bequeaths 2,000 rupees to his "before-mentioned aunt Mary." There is no person to whom the description given in the Will can apply, and evidence is not admissible to show who was meant by "his before-mentioned aunt Mary." The bequest is therefore void for uncertainty under the seventy-sixth Section.

(*b*) A bequeaths 1,000 rupees to , leaving a blank for the name of the legatee. Evidence is not admissible to show what name the testator intended to insert.

(*c*) A bequeaths to B rupees, or "his estate of ." Evidence is not admissible to show what sum or what estate the testator intended to insert.

Meaning of any clause to be collected from entire Will.

69. The meaning of any clause in a Will is to be collected from the entire instrument, and all its parts are to be construed with reference to each other; and for this purpose a Codicil is to be considered as part of the Will.

Illustrations.

(*a*) The testator gives to B a specific fund or property at the death of A, and by a subsequent clause gives the whole of his property to A. The effect of the several clauses taken together is to vest the specific fund or property in A for life, and after his decease in B; it appearing from the bequest to B that the testator meant to use in a restricted sense the words in which he describes what he gives to A.

(*b*) Where a testator having an estate, one part of which is called Black Acre, bequeaths the whole of his estate to A, and in another part of his Will bequeaths Black Acre to B, the latter bequest is to be read as an exception out of the first as if he had said, "I give Black Acre to B, and all the rest of my estate to A."

When words may be understood in a restricted sense, and when in a sense wider than usual.

70. General words may be understood in a restricted sense where it may be collected from the Will that the testator meant to use them in a restricted sense; and words may be understood in a wider sense than that which they usually bear, where it may be collected from the other words of the Will that the testator meant to use them in such wider sense.

Illustrations.

(*a*) A testator gives to A "his farm in the occupation of B" and to C "all his marsh lands in L." Part of the farm in the occupation of B consists of marsh lands in L, and the testator also has other marsh lands in L. The general words,

"all his marsh lands in L," are restricted by the gift to A. A takes the whole of the farm in the occupation of B, including that portion of the farm which consists of marsh lands in L.

(*b*) The testator (a sailor on ship-board) bequeathed to his mother his gold ring, buttons, and chest of clothes, and to his friend A (a shipmate) his red box, clasp-knife, and all things not before bequeathed. The testator's share in a house does not pass to A under this bequest.

(*c*) A, by his Will, bequeathed to B all his household furniture, plate, linen, china, books, pictures, and all other goods of whatever kind; and afterwards bequeathed to B a specified part of his property. Under the first bequest B is entitled only to such articles of the testator's as are of the same nature with the articles therein enumerated.

Where a clause is open to two constructions, that which has some effect is to be preferred.

71. Where a clause is susceptible of two meanings, according to one of which it has some effect, and according to the other it can have none, the former is to be preferred.

No part of Will to be rejected, if reasonable construction can be put on it.

72. No part of a Will is to be rejected as destitute of meaning if it is possible to put a reasonable construction upon it.

Interpretation of words repeated in different parts of Will.

73. If the same words occur in different parts of the same Will, they must be taken to have been used everywhere in the same sense, unless there appears an intention to the contrary.

Testator's intention to be effectuated as far as possible.

74. The intention of the testator is not to be set aside because it cannot take effect to the full extent, but effect is to be given to it as far as possible.

Illustration.

The testator by a Will, made on his death-bed, bequeathed all his property to C D for life, and after his decease to a certain hospital. The intention of the testator cannot take effect to its full extent, because the gift to the hospital is void under the hundred and fifth section, but it shall take effect so far as regards the gift to C D.

The last of two inconsistent clauses prevails.

75. Where two clauses or gifts in a Will are irreconcilable, so that they cannot possibly stand together, the last shall prevail.

Illustrations.

(*a*) The testator by the first clause of his Will leaves his estate of Rámnagar "to A," and by the last clause of his Will leaves it "to B and not to A." B shall have it.

(*b*) If a man at the commencement of his Will gives his house to A, and at the close of it directs that his house shall be sold and the proceeds invested for the benefit of B, the latter disposition shall prevail.

Will or bequest void for uncertainty.

76 A Will or bequest not expressive of any definite intention is void for uncertainty.

Illustration.

If a testator says—"I bequeath goods to A;" or "I bequeath to A;" or "I leave to A all the goods mentioned in a Schedule," and no Schedule is found; or "I bequeath 'money,' 'wheat,' 'oil,' or the like," without saying how much, this is void.

Words describing subject refer to property answering that description at testator's death.

77. The description contained in a Will, of property the subject of gift, shall, unless a contrary intention appear by the Will, be deemed to refer to and comprise the property answering that description at the death of the testator.

Power of appointment executed by general bequest.

78. Unless a contrary intention shall appear by the Will, a bequest of the estate of the testator shall be construed to include any property which he may have power to appoint by Will to any object he may think proper, and shall operate as an execution of such power; and a bequest of property described in a general manner shall be construed to include any property to which such description may extend, which he may have power to appoint by Will to any object he may think proper, and shall operate as an execution of such power.

Implied gift to the objects of a power in default of appointment.

79. Where property is bequeathed to or for the benefit of such of certain objects as a specified person shall appoint, or for the benefit of certain objects in such proportions as a specified person shall appoint: and the Will does not provide for the event of no appointment being made; if the power given by the Will be not exercised, the property belongs to all the objects of the power in equal shares.

Illustration.

A, by his Will, bequeaths a fund to his wife for her life, and directs that at her death it shall be divided among his children in such proportions as she shall appoint. The widow dies without having made any appointment. The fund shall be divided equally among the children.

Bequest to "heirs," &c., of a particular person without qualfying terms.

80. Where a bequest is made to the "heirs," or "right heirs," or "relations," or "nearest relations," or "family," or "kindred," or "nearest of kin," or "next of kin," of a particular person, without any qualifying terms, and the class so designated forms the direct and independent object of the bequest, the property bequeathed shall be distributed as if it had belonged to such person, and he had died intestate in respect of it, leaving assets for the payment of his debts independently of such property.

Illustrations.

(*a*) A leaves his property "to his own nearest relations." The property goes to those who would be entitled to it if A had died intestate, leaving assets for the payment of his debts independently of such property.

(*b*) A bequeaths 10,000 rupees "to B for his life, and after the death of B, to his own right heirs." The legacy after B's death belongs to those who would be entitled to it if it had formed part of A's unbequeathed property.

(*c*) A leaves his property to B; but if B dies before him, to B's next of kin: B dies before A; the property devolves as if it had belonged to B, and he had died intestate leaving assets for the payment of his debts independently of such property.

(*d*) A leaves 10,000 rupees "to B for his life, and after his decease, to the heirs of C." The legacy goes as if it had belonged to C, and he had died intestate, leaving assets for the payment of his debts independently of the legacy.

Bequest to "representatives," &c., of a particular person.

81. Where a bequest is made to the "representatives," or "legal representatives," or "personal representatives," or "executors or administrators" of a particular person, and the class so designated forms the direct and independent object of the bequest, the property bequeathed shall be distributed as if it had belonged to such person, and he had died intestate in respect of it.

Illustration.

(*a*) A bequest is made to the "legal representatives of A." A has died intestate and insolvent. B is his administrator. B is entitled to receive the legacy, and shall apply it in the first place to the discharge of such part of A's debts as may remain unpaid; if there be any surplus, B shall pay it to those persons who at A's death would have been entitled to receive any property of A's, which might remain after payment of his debts, or to the representatives of such persons.

Bequest without words of limitation.

82. Where property is bequeathed to any person, he is entitled to the whole interest of the testator therein, unless it appears from the Will that only a restricted interest was intended for him.

Bequest in the alternative.

83. Where property is bequeathed to a person, with a bequest in the alternative to another person or to a class of persons;—if a contrary intention does not appear by the Will, the legatee first named shall be entitled to the legacy, if he be alive at the time when it takes effect; but if he be then dead, the person or class of persons named in the second branch of the alternative shall take the legacy.

Illustrations.

(*a*) A bequest is made to A or to B. A survives the testator. B takes nothing.

(*b*) A bequest is made to A or to B. A dies after the date of the Will, and before the testator. The legacy goes to B.

(*c*) A bequest is made to A or to B. A is dead at the date of the Will. The legacy goes to B.

(*d*) Property is bequeathed to A or his heirs. A survives the testator. A takes the property absolutely.

(*e*) Property is bequeathed to A or his nearest of kin. A dies in the lifetime of the testator. Upon the death of the testator, the bequest to A's nearest of kin takes effect.

(*f*) Property is bequeathed to A for life, and after his death to B or his heirs. A and B survive the testator, B dies in A's lifetime. Upon A's death the bequest to the heirs of B takes effect.

(*g*) Property is bequeathed to A for life, and after his death to B or his heirs. B dies in the testator's lifetime. A survives the testator. Upon A's death the bequest to the heirs of B takes effect.

Effect of words describing a class added to a bequest to a person.

84. Where property is bequeathed to a person, and words are added which describe a class of persons, but do not denote them as direct objects of a distinct and independent gift, such person is entitled to the whole interest of the testator therein, unless a contrary intention appears by the Will.

Illustrations.

(*a*) A bequest is made—

to A and his children.
to A and his children by his present wife.
to A and his heirs.
to A and the heirs of his body.
to A and the heirs male of his body.
to A and the heirs female of his body.
to A and his issue.
to A and his family.
to A and his descendants.
to A and his representatives.
to A and his personal representatives.
to A, his executors and administrators.

In each of these cases, A takes the whole interest which the testator had in the property.

(*b*) A bequest is made to A and his brothers. A and his brothers are jointly entitled to the legacy.

(*c*) A bequest is made to A for life, and after his death to his issue. At the death of A the property belongs in equal shares to all persons who shall then answer the description of issue of A.

Bequest to a class of persons under a general description only.

85. Where a bequest is made to a class of persons under a general description only, no one to whom the words of the description are not in their ordinary sense applicable shall take the legacy.

Construction of terms.

86. The word "children" in a Will applies only to lineal descendants in the first degree; the word "grandchildren" applies only to lineal descendants in the second degree of the person whose "children," or "grandchildren," are spoken of; the words "nephews" and "nieces" apply only to children of brothers or sisters; the words "cousins" or "first cousins," or "cousins-german" apply only to children of brothers or of sisters of

the father or mother of the person whose "cousins," or "first cousins," or "cousins-german," are spoken of; the words "first cousins once removed" apply only to children of cousins-german, or to cousins-german of a parent, of the person whose "first cousins once removed" are spoken of; the words "second cousins" apply only to grandchildren of brothers or of sisters of the grandfather or grandmother of the person whose "second cousins" are spoken of; the words "issue" and "descendants" apply to all lineal descendants whatever of the person whose "issue" or "descendants" are spoken of. Words expressive of collateral relationship apply alike to relatives of full and of half blood. All words expressive of relationship apply to a child in the womb who is afterwards born alive.

Words expressing relationship denote only legitimate relatives, or failing such, relatives reputed legitimate.

87. In the absence of any intimation to the contrary in the Will, the term "child," "son," or "daughter," or any word which expresses relationship, is to be understood as denoting only a legitimate relative, or where there is no such legitimate relative, a person who has acquired, at the date of the Will, the reputation of being such relative.

Illustrations.

(*a*) A, having three children, B, C, and D, of whom B and C are legitimate and D is illegitimate, leaves his property to be equally divided among "his children." The property belongs to B and C in equal shares, to the exclusion of D.

(*b*) A, having a niece of illegitimate birth, who has acquired the reputation of being his niece, and having no legitimate niece, bequeaths a sum of money to his niece. The illegitimate niece is entitled to the legacy.

(*c*) A, having in his Will enumerated his children, and named as one of them B, who is illegitimate, leaves a legacy to "his said children." B will take a share in the legacy along with the legitimate children.

(*d*) A leaves a legacy to the "children of B." B is dead, and has left none but illegitimate children. All those who had, at the date of the Will, acquired the reputation of being the children of B are objects of the gift.

(*e*) A bequeathed a legacy to "the children of B." B never had any legitimate child. C and D had at the date of the Will acquired the reputation of being children of B. After the date of the Will, and before the death of the testator, E and F were born; and acquired the reputation of being children of B. Only C and D are objects of the bequest.

(*f*) A makes a bequest in favour of his child by a certain woman, not his wife. B had acquired at the date of the Will the reputation of being the child of A by the woman designated. B takes the legacy.

(*g*) A makes a bequest in favour of the child to be born of a woman, who never becomes his wife. The bequest is void.

(*h*) A makes a bequest in favour of the child of which a certain woman, not married to him, is pregnant. The bequest is valid.

88. Where a Will purports to make two bequests to the same person, and a question arises whether the testator intended to make the second bequest instead of or in addition to the first; if there is nothing in the Will to show what he intended, the following rules shall prevail in determining the construction to be put upon the Will:—

Rules of construction where a Will purports to make two bequests to the same person.

First,—If the same specific thing is bequeathed twice to the same legatee in the same Will, or in the Will and, again in a Codicil, he is entitled to receive that specific thing only.

Second,—Where one and the same Will or one and the same Codicil purports to make in two places a bequest to the same person of the same quantity or amount of anything, he shall be entitled to one such legacy only.

Third,—Where two legacies of unequal amount are given to the same person in the same Will, or in the same Codicil, the legatee is entitled to both.

Fourth,—Where two legacies, whether equal or unequal in amount, are given to the same legatee, one by a Will and the other by a Codicil, or each by a different Codicil, the legatee is entitled to both legacies.

Explanation.—In the four last rules, the word "Will" does not include a Codicil.

Illustrations.

(*a*) A having ten shares, and no more, in the Bank of Bengal, made his Will, which contains, near its commencement, the words "I bequeath my ten shares in the Bank of Bengal to B." After other bequests, the Will concludes with the words "and I bequeath my ten shares in the Bank of Bengal to B." B is entitled simply to receive A's ten shares in the Bank of Bengal.

(*b*) A having one diamond ring, which was given him by B, bequeathed to C the diamond ring which was given him by B. A afterwards made a Codicil to his Will, and thereby, after giving other legacies, he bequeathed to C the diamond ring which was given him by B. C can claim nothing except the diamond ring which was given to A by B

(*c*) A, by his Will, bequeaths to B the sum of 5,000 rupees, and afterwards, in the same Will, repeats the bequest in the same words. B is entitled to one legacy of 5,000 rupees only.

(*d*) A, by his Will, bequeaths to B the sum of 5,000 rupees, and afterwards, by the same Will, bequeaths to B the sum of 6,000 rupees. B is entitled to 11,000 rupees.

(*e*) A, by his Will, bequeaths to B 5,000 rupees, and by a Codicil to the Will he bequeaths to him 5,000 rupees. B is entitled to receive 10,000 rupees.

(*f*) A, by one Codicil to his Will, bequeaths to B 5,000 rupees, and by another Codicil, bequeaths to him 6,000 rupees. B is entitled to receive 11,000 rupees.

(*g*) A, by his Will, bequeaths "500 rupees to B because she was his nurse," and in another part of the Will bequeaths 500 rupees to B "because she went to England with his children." B is entitled to receive 1,000 rupees.

(*h*) A, by his Will, bequeaths to B the sum of 5,000 rupees, and also, in another part of the Will, an annuity of 400 rupees. B is entitled to both legacies.

(*i*) A, by his Will, bequeaths to B the sum of 5,000 rupees, and also bequeaths to him the sum of 5,000 rupees if he shall attain the age of 18. B is entitled absolutely to one sum of 5,000 rupees, and takes a contingent interest in another sum of 5,000 rupees.

Constitution of residuary legatee.

89. A residuary legatee may be constituted by any words that show an intention on the part of the testator that the person designated shall take the surplus or residue of his property.

Illustrations.

(*a*) A makes her Will, consisting of several testamentary papers, in one of which are contained the following words :—

"I think there will be something left, after all funeral expenses, &c., to give to B, now at school, towards equipping him to any profession he may hereafter be appointed to." B is constituted residuary legatee.

(*b*) A makes his Will, with the following passage at the end of it:—"I believe "there will be found sufficient in my banker's hands to defray and discharge my "debts, which I hereby desire B to do, and keep the residue for her own use and "pleasure." B is constituted the residuary legatee.

(*c*) A bequeaths all his property to B, except certain stocks and funds, which he bequeaths to C. B is the residuary legatee.

Property to which a residuary legatee is entitled.

90. Under a residuary bequest, the legatee is entitled to all property belonging to the testator at the time of his death, of which he has not made any other testamentary disposition which is capable of taking effect.

Illustration.

A by his Will bequeaths certain legacies, one of which is void under the hundred and fifth Section,[1] and another lapses by the death of the legatee. He bequeaths the residue of his property to B. After the date of his Will, A purchases a zamíndárí, which belongs to him at the time of his death. B is entitled to the two legacies and the zamíndárí as part of the residue.

Time of vesting of legacy in general terms.

91. If a legacy be given in general terms, without specifying the time when it is to be paid, the legatee has a vested interest in it from the day of the death of the testator, and if he dies without having received it, it shall pass to his representatives.

In what case a legacy lapses.

92. If the legatee does not survive the testator, the legacy cannot take effect, but shall lapse and form part of the residue of the testator's property, unless it appear by the Will that the testator intended that it should go to some other person. In order to entitle the representatives of the legatee to receive the legacy, it must be proved that he survived the testator.

[1] See page 311, note 1.

Illustrations.

(*a*) The testator bequeaths to B "500 rupees which B owes him." B dies before the testator; the legacy lapses.

(*b*) A bequest is made to A and his children. A dies before the testator or happens to be dead when the Will is made. The legacy to A and his children

(*c*) A legacy is given to A, and in case of his dying before the testator, to B. A dies before the testator. The legacy goes to B.

(*d*) A sum of money is bequeathed to A for life, and after his death to B. A dies in the lifetime of the testator; B survives the testator. The bequest to B takes effect.

(*e*) A sum of money is bequeathed to A on his completing his eighteenth year, and in case he should die before he completes his eighteenth year, to B. A completes his eighteenth year, and dies in the lifetime of the testator. The legacy to A lapses, and the bequest to B does not take effect.

(*f*) The testator and the legatee perished in the same shipwreck. There is no evidence to show which died first. The legacy will lapse.

A legacy does not lapse if one of two joint legatees die before the testator.

93. If a legacy be given to two persons jointly, and one of them die before the testator, the other legatee takes the whole.

Illustration.

The legacy is simply to A and B. A dies before the testator. B takes the legacy.

Effect in such a case, of words showing testator's intention that the shares should be distinct.

94. But where a legacy is given to legatees in words which show that the testator intended to give them distinct shares of it, then if any legatee die before the testator, so much of the legacy as was intended for him shall fall into the residue of the testator's property.

Illustration.

A sum of money is bequeathed to A, B, and C, to be equally divided among them. A dies before the testator. B and C shall only take so much as they would have had if A had survived the testator.

When lapsed share goes as undisposed of.

95. Where the share that lapses is a part of the general residue bequeathed by the Will, that share shall go as undisposed of.

Illustration.

The testator bequeaths the residue of his estate to A, B, and C, to be equally divided between them. A dies before the testator. His one-third of the residue goes as undisposed of.

When a bequest to testator's child or lineal descendant does not lapse on his death in testator's lifetime.

96. Where a bequest shall have been made to any child or other lineal descendant of the testator, and the legatee shall die in the lifetime of the testator, but any lineal descendant of his shall survive the testator, the bequest shall not lapse, but shall take effect as if the death of the legatee had happened immediately after the death of the testator, unless a contrary intention shall appear by the Will.

Illustration.

A makes his Will, by which he bequeaths a sum of money to his son B for his own absolute use and benefit. B dies before A, leaving a son C, who survives A, and having made his Will, whereby he bequeaths all his property to his widow D. The money goes to D.

Bequest to A for the benefit of B does not lapse by A's death in testator's lifetime.

97. Where a bequest is made to one person for the benefit of another, the legacy does not lapse by the death, in the testator's lifetime, of the person to whom the bequest is made.

Survivorship in case of bequest to a described class.

98. Where a bequest is made simply to a described class of persons, the thing bequeathed shall go only to such as shall be alive at the testator's death.

Exception.—If property is bequeathed to a class of persons described as standing in a particular degree of kindred to a specified individual, but their possession of it is deferred until a time later than the death of the testator, by reason of a prior bequest or otherwise, the property shall at that time go to such of them as shall be then alive, and to the representatives of any of them who have died since the death of the testator.

Illustrations.

(*a*) A bequeaths 1,000 rupees to "the children of B" without saying when it is to be distributed among them. B had died previous to the date of the Will, leaving three children, C, D, and E. E died after the date of the Will, but before the death of A. C and D survive A. The legacy shall belong to C and D, to the exclusion of the representatives of E.

(*b*) A bequeaths a legacy to the children of B. At the time of the testator's death, B has no children. The bequest is void.

(*c*) A lease for years of a house was bequeathed to A for his life, and after his decease to the children of B. At the death of the testator, B had two children living, C and D; and he never had any other child. Afterwards, during the lifetime of A, C died, leaving E his executor. D has survived A. D and E are jointly entitled to so much of the leasehold term as remains unexpired.

(*d*) A sum of money was bequeathed to A for her life, and after her decease to the children of B. At the death of the testator, B had two children living, C and D, and after that event, two children, E and F, were born to B. C and E died in

the lifetime of A, C having made a Will, E having made no Will. A has died, leaving D and F surviving her. The legacy is to be divided into four equal parts, one of which is to be paid to the executor of C, one to D, one to the administrator of E, and one to F.

(*e*) A bequeaths one-third of his lands to B for his life, and after his decease to the sisters of B. At the death of the testator, B had two sisters living, C and D, and after that event another sister, E, was born. C died during the life of B; D and E have survived B. One-third of A's lands belongs to D, E, and the representatives of C, in equal shares.

(*f*) A bequeaths 1,000 rupees to B for life, and after his death equally among the children of C. Up to the death of B, C had not had any child. The bequest after the death of B is void.

(*g*) A bequeaths 1,000 rupees to "all the children born or to be born" of B, to be divided among them at the death of C. At the death of the testator, B has two children living, D and E After the death of the testator, but in the lifetime of C, two other children, F and G, are born to B. After the death of C, another child is born to B. The legacy belongs to D, E, F, and G, to the exclusion of the after-born child of B.

(*h*) A bequeaths a fund to the children of B, to be divided among them when the eldest shall attain majority. At the testator's death, B had one child living, named C. He afterwards had two other children, named D and E. E died, but C and D were living when C attained majority. The fund belongs to C, D, and the representatives of E, to the exclusion of any child who may be born to B after C's attaining majority.

The following cases, connected with the interpretation of Hindú and other Wills, may be studied with advantage:—*Ganendra Mohan Tagore* v. *Upendra Mohan Tagore and others*, IV B. L. R. O. C. 103; same case before the Privy Council, IX B. L. R.: *Ananda Krishna Bose and another* v. *Kumara Rajendra Narain Deb and others*, IV B. L. R. O. C. 231: *Mussamat Fanny Barlow* v. *Sophia Eveline Orde and others* (P. C.), V B. L. R. 1: *Srigaja Patthí Radhika Patta Mahadebí Gúrú* v. *Srigajapatthí Hari Krishna Debí Gúrú* (P. C.), VI B. L. R. 202.

General Clauses Acts.

With Section 100 ends Part II, Chapters V and VI, relating to documentary evidence. There are, however, a few other points connected with documents which it may be convenient to notice. In interpreting the Acts of the Indian Legislatures, it will be well to bear in mind the provisions of the General Clauses Acts, passed for the purpose of shortening the language used in Acts of those Legislatures. These are—Acts I of 1868, I (M. C.) of 1867, X (Bom. C.) of 1866, and V (B. C.) of 1867. As to Acts of Parliament, see 13 & 14 Vict., Cap. 21.

Power to send for Original Public Documents.

The Evidence Act provides for certified *copies* of public documents. Cases, however, may arise in which it may be necessary or advisable to inspect the *originals*. Section 138 of the Code of Civil Procedure empowers any Civil Court of its own accord or upon the application

of any of the parties to the suit, to send for, either from its own record or from any other public office or Court, the record of any other suit or case, or any other official papers (not being documents relating to affairs of State, the production of which may be contrary to good policy), and inspect the same, when such inspection shall appear likely to elucidate the facts of the suit before the Court, and to promote the ends of justice. Section 365 of the Code of Criminal Procedure empowers an officer in charge of a Police-station or any Criminal Court, considering the production of any document necessary or desirable for the purposes of any investigation or judicial proceeding, to issue a summons to the party in whose keeping such document is believed to be, requiring him to attend and produce such document at the time and place stated in the summons. Reading this last Section with the Section that follows it in the Code of Criminal Procedure, it may be doubtful if it was intended to refer to public documents. The Code of Criminal Procedure contains no Section similar to Section 138 of the Code of Civil Procedure. I have already mentioned (*ante*, page 311) that there is no Statute of Frauds in India out of the Presidency towns. Contracts which under this Statute must be in writing can therefore be made *orally* in the Indian Mofussil. There are, however, certain contracts which, if they be made in writing, the writing must be registered in order to have effect; and there are others, the registration of the writing containing which is *optional* but not compulsory. The following Sections of the Indian Registration Act, VIII of 1871, show what documents *must* be registered; what documents *may* be registered; and what are the effects of registration and non-registration:—

Documents of which the registration compulsory.

17. The documents next hereinafter mentioned *shall* be registered, if the property to which they relate is situate in a district in which, and if they have been executed on or after the date on which, Act No. XVI of 1864, or Act No. XX of 1866, or this Act came or comes into force (that is to say),—

(1) Instruments of gift of immovable property:

(2) Other instruments (not being wills) which purport or operate to create, declare, assign, limit, or extinguish, whether in present or in future, any right, title, or interest, whether vested or contingent, of the *value of one hundred rupees and upwards*, to or in immovable property:

(3) Instruments (not being wills) which *acknowledge the receipt or payment of any consideration* on account of the creation, declaration, assignment, limitation, or extinction of any such right, title, or interest; and

(4) Leases of immovable property from year to year, or for any term exceeding one year, or reserving a yearly rent.

Provided that the Local Government may, by order published in the official Gazette, exempt from the operation of the former part of this Section any leases executed in any district, or part of a district, the terms granted by which do not exceed five years, and the annual rents reserved by which do not exceed fifty rupees.

Exception of composition-deeds; and of transfers of shares and debentures in Land Companies.

Nothing in clauses (2) and (3) of this Section applies

(*a*) to any composition-deed,

(*b*) to any instrument relating to shares in a Joint Stock Company, notwithstanding that the assets of such Company consist in whole or in part of immovable property, or

(*c*) to any endorsement upon or transfer of any debenture issued by any such Company.

Authorities to *adopt a son*, executed after the first day of January, 1872, and not conferred by a will, shall also be registered.

Documents of which the registration is optional.

18. Any of the documents next hereinafter mentioned *may* be registered under this Act (that is to say),—

(1) Instruments (other than instruments of gift and wills) which purport or operate to create, declare, assign, limit, or extinguish, whether in present or in future, any right, title, or interest, whether vested or contingent, of a value *less than one hundred rupees* to or in immovable property:

(2) Instruments acknowledging the receipt or payment of any consideration on account of the creation, declaration, assignment, limitation, or extinction of any such right, title, or interest:

(3) Leases of immovable property for any term not exceeding one, year, and leases exempted under Section seventeen:

(4) Awards relating to immovable property:

(5) Instruments which purport or operate to create, declare, assign, limit, or extinguish any right, title, or interest to or in movable property:

(6) Wills:

(7) Acknowledgments, Agreements, Appointment, Articles of Partnership, Assignments, Awards, Bills of Exchange, Bills of Sale, Bonds, Composition-deeds, Conditions of Sale, Contracts,[1] certified copies of decrees and orders of Courts, Covenants, Grants, Instruments of Dissolution of Partnership, Instruments of Partition, Powers-of-Attorney, Promissory Notes, Releases, Settlements, Writings of Divorcement, *and all other documents not hereinbefore mentioned.*

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[1] For certain contracts which *must* be registered, see Section 25 of the Indian Contract Act, IX of 1872.

Time from which registered document operates.

47. A registered document shall operate from the time from which it would have commenced to operate if no registration thereof had been required or made, and not from the time of its registration.

Registered documents relating to property when to take effect against oral agreements.

48. All documents, not testamentary, duly registered under this Act and relating to any property, whether movable or immovable, shall take effect against any *oral* agreement or declaration relating to such property, *unless where the agreement or declaration has been accompanied or followed by delivery of possession.*

Effect of non-registration of documents required to be registered.

49. No document required by section seventeen to be registered

shall affect any immovable property comprised therein,

or confer any power to adopt,

or be received as evidence of any transaction *affecting such property or conferring such power*,

unless it has been registered in accordance with the provisions of this Act.

Registered documents relating to immovables, of which the registration is optional, to take effect against unregistered documents.

50. Every document of the kinds mentioned in clauses (1) and (2) of section eighteen, shall, if duly registered, take effect as regards the property comprised therein, *against every unregistered document* relating to the same property, and not being a decree or order, whether such unregistered document be of the same nature as the registered document or not.

Explanation.—In cases where Act No. XVI of 1864 or Act No. XX of 1866 was in force in the place and at the time in and at which such unregistered document was executed, "unregistered" means not registered according to such Act, and, where the document is executed after the first day of July, 1871, not registered under this Act.

Act IX of 1871 is the third Registration Act passed within the space of eight years (the other two being Acts XVI of 1864 and XX of 1866). The impossibility of at once dealing successfully with a new subject of legislation necessitated this repeated revision of the law which was directed to remove difficulties as they arose and to reform what was found in practice to work hardship. Here, as elsewere, a knowledge of the stages through which the law has passed and of those doubts to obviate which particular language has been used in the latest enactment, will materially assist the understanding of the text of the law as it stands. Sections 17, 18, and 47 require no particular notice. Testamentary documents, *i. e.*, wills, are excluded from the operation of Section 48. The

registration of written wills is optional. Nuncupative or verbal wills are legal, except in cases to which Act X of 1865 or Act XXI or 1870 applies, and requires writing. In the same Section the words "*unless where the agreement or declaration has been accompanied or followed by delivery of possession*" are new, and were added in accordance with two decisions of the Calcutta High Court upon the old law, *viz.*, *Selam Sheikh* v. *Beidonath Ghatak*, III B. L. R 312, and *Narsingh Porkait* v. *Mussamat Bewah and others*, V B. L. R. Appen. 86. In the former of these cases the reason of the ruling will be found discussed. The decision in the second case professes to follow that in the first, but the agreement which was here accompanied by possession was a *written unregistered* one, not a verbal one. Having reference to Section 49 of the present Act, it may appear that such an instrument cannot be used at all as evidence of any transaction affecting immovable property of the value of one hundred rupees and upwards; and there being a writing in existence, Section 91 of the Evidence Act will exclude oral evidence of the contract. Where the property is of a value less than one hundred rupees, the unregistered document will be admissible in evidence, but Section 50, in giving the priority to a registered over an unregistered document, makes no exception where the latter has been accompanied or followed by possession.

Effect of possession under an *unregistered* document.

Section 49 must be read with Section 17. The unregistered document is inadmissible as evidence of any transaction affecting the immovable property or conferring power to adopt. Oral evidence of the transaction will be excluded by Section 91 of the Evidence Act. *The result is that gifts of immovable property of whatever value, contracts creating &c. any right, title, or interest of the value of one hundred rupees or upwards in immovable property, certain leases, and authorities to adopt conferred otherwise than by will, if committed to writing and not registered, are incapable of proof and wholly inoperative.* This result followed even before the passing of the Evidence Act. In the case of *Sheikh Rahmatúla* v. *Sheikh Sariatúla Kagchi*, I B. L. R. F. B. 58, the plaintiff sued to establish his title to certain land which he alleged that he had purchased. There was a written conveyance, which was not registered, owing, as the plaintiff averred, to certain fraudulent objections made before the registering officer by the defendant, the alleged vendor. It was decided that the plaintiff could not have a declaration of title which rested upon the written instrument, it being incapable of being used as evidence because not registered, and parol evidence being inadmissible to supply its place. Peacock, C. J.

Certain transactions committed to writing but not Registered incapable of proof.

said in his judgment:[1] "I agree with the remark of the Division Bench in *Manmahini Dasi* v. *Bishen Mayi*" (VII W. R. Civ. Rul. 112) "where 'a party comes into Court resting his claim on a written title, which the law requires to be registered; he cannot when he has failed to register, and is in consequence unable to use his title-deed, turn round and say, I can prove my title by secondary evidence.' But the plaintiff in this case wants something more. He is not satisfied to let his contract rest on the verbal contract and possession. He tells the Court that a deed was executed; that he was entitled to have that deed registered; that the defendant went before the Registrar and fraudulently stated that the deed was not intended to operate as a bill of sale, but merely as a mortgage; that the Registrar consequently refused to register the deed; that the declaration of the defendant and the refusal of the Registrar have cast a cloud over his title, which he asks the Court to dispel by declaring that, looking to the whole of the transaction between the parties, he is entitled absolutely to the lands. It appears that, independently of other considerations, we ought not, unless we can say that the deed operated and was intended to operate as an absolute sale, declare upon the faith of that deed that the plaintiff had a title. If the parties did enter into a complete contract of sale before the deed, our decree will place them in a very different position from that in which they would have been if they had relied upon that verbal contract alone." A Full Bench of the High Court of the North-West Provinces decided to the same effect in *Rájá Krishna Kishor Chand* v. *Mahomed Zuhaúla and others*, I N-W-P. Rep. F. B. 148. See also *Prabharam Hazra* v. *T. M. Robinson and another*, III B. L. R. Appen. 49: *Shankar Bapú* v. *Vishnú Narain*, I Bom. H. C. Rep. A. C. 79: *Mussammat Kabúlan* v. *Shamshír Alí*, XI W. R. 16.—The cases, *Mir Hilaludín* v. *Chaudhrí Abdúl Sattar*, IX W. R. Civ. Rul. 351, and *Bhimal Mahtun* v. *Mussamat Alimassa*, VIII W. R. Civ. Rul. 423, are no longer law. In *Sheikh Parabdi Sabuni* v. *Sheikh Mohamed Hosen*, I B. L. R. Civ. Ap. 37, the bill of sale had been duly registered, and the defendant produced an *unregistered ikrarnamah* to show that the transaction was not an absolute sale but only by way of mortgage. Although the *ikrarnama* was not admissible in evidence, being unregistered, it was held that the Court might look at other and independent evidence supplied by the acts and conduct of the parties in order to discover the real nature of the transaction. This case seems to have proceeded on the principle before adverted to in connection with the case of *Kashinath Chatterji* v. *Chandi Charan Banerji*, *ante*, p. 322. It may be doubtful if it would now

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[1] The student is recommended to read the whole report of this case, which, in addition to the able judgment of the Chief Justice, contains the arguments on the other side well put by Mr. Justice Mitter.

be held to be law, or if it can be supported on the authority of *Chaudhrí Debí Persad* v. *Chaudhrí Daulat Singh*, III Moo. Ind Ap. 347, referred to in the judgment. This latter case decided merely that the recital of the receipt of *consideration* in a written instrument may be contradicted by other evidence, in accordance with what has always been an exception to the general rule, and as such has been incorporated in the first *Proviso* to Section 92 of the Indian Evidence Act.

Procedure to enforce Registration.

When the registering officers refuse to register a document on the ground that the executant denies its execution or on any other ground, the person claiming under such document, his representative, assign, or duly authorized agent may apply by petition to the District Court in order to establish his right to have the document registered. If the District Court finds that the *document has been executed and that the requirements of the Registration Law have been complied with*, it shall order the document to be registered (see Sections 73—76 of the Registration Act). In the case of *Rájáh Krishno Kishore Chund* v. *Mahomed Zakaúlah and others*, I N-W-P. Rep. F. B. 148, an opinion was expressed that, apart from the special remedy afforded by the provisions of the Registration Act, a regular suit to enforce registration is maintainable. Peacock, C.J., and others of the Judges who decided the case of *Sheikh Rahmatúla* v. *Sheikh Saratúla*, I B. L. R. F. B. 58, were of a contrary opinion, but this point did not actually arise in that case. In *Tulsí Saha and others* v. *Mahadeo Das and another*, II B. L. R. A. C. 105, it was, however, directly decided that such a suit is not maintainable, and that the sole remedy is that provided by the Registration Act. See also *Mussamat Súram Batti* v. *Mussamat Badhessurí and others*, X W. R. 313. In can scarcely, however, be said that the law on this point is as yet satisfactorily settled. Several of the Judges have expressed opinions in favour of the view that a separate suit is or ought to be maintainable, and there are strong arguments is support of this view. At the same time it may be observed that all that has yet been decided is, that where a bill of sale has been actually written, any party claiming under it can proceed only under the provisions of the Registration Act to have it registered. If there were an agreement to convey, and if specific performance of this agreement were sought, there probably can be no doubt but that in the execution of a decree for specific performance, the Court would compel the defendant to do everything (including registration) necessary to make a good conveyance. If the first conveyance were not registered within time, the defendant might be compelled to execute a fresh one: and execution under Section 202[1]

[1] If the decree be for the execution of a conveyance or for the endorsement of a negotiable instrument, and the party ordered to execute or endorse such conveyance or negotiable instrument shall neglect or refuse so to do, any party

of the Code of Civil Procedure would undoubtedly be sufficient to justify an order for registration by the District Court under Section 76 of the Registration Act. I have heard many complaints, and have known many instances of hardship, arising from vendors refusing to assist in obtaining registration, after they had received the whole or part of the consideration. Such cases are, however, the result not of any defect in the law but of the improvidence of vendees, who part with their money so hastily. The danger is one easily guarded against. "A purchaser," said Peacock, C. J., in *Sheikh Rahmatúla* v. *Sheikh Sariatúla*, "can always protect himself, and, if he does not, it is his own fault. He should take care before he pays his purchase-money to get the deed registered, or to obtain an authenticated power from the vendor to authorize some one in whom the purchaser has confidence to register the deed as agent of the vendor. I have seen instances in which a purchaser has refused to pay the purchase-money before he has got the deed registered, or an authenticated power to his own attorney from the vendor appointing him the vendor's attorney to register." Of the two courses here suggested, the latter is more suitable to the Presidency towns than to the Mofussil where the services of attorneys are unknown. The retention of the purchase-money till after registration will seldom be consented to by the vendor, who is usually apprehensive that after registration the price will not be paid, or at least advantage will be taken of the opportunity to enforce some abatement. Unfortunately this apprehension is too often justified—punic faith being as common on the one side as on the other. The simplest course in all cases might seem to be to have *an agreement to convey* executed in the first instance. Such an agreement does not require registration in order to be admissible in evidence (Clause 7, Section 18 of the Registration Act: *Bhairabnath Khetrí* v. *Kishorí Mohan Saha*, III B. L. R. Appen. 1 (Agreement for lease): *Court of Wards* v. *Nitta Kalí Debí and another*, III B. L. R. A. C. 353 (Suit for refund of purchase-money where vendor failed to perform his agreement to register): *Banwárí Lal and others* v. *Sangam Lal and others*, VII W. R. Civ. Rul. 280 (*Amaldustuk* preliminary to main contract): *Goluk Kishore Acharji Chaudhrí* v. *Nand Mohan Dey Sírkar*, XII W. R. 394 (*Daul* or *Amildárí*): *Ram Tonú Surma Sírkar* v. *Gour Chandra Surma Sírkar*, III W. R. Civ. Rul. 64). The vendee can, therefore, sue upon this agreement either for refund of his purchase-money or for specific performance. Again, if no preliminary and separate agreement to convey be executed,

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interested in having the same executed or endorsed may prepare a conveyance or endorsement of the instrument in accordance with the terms of the decree, and tender the same to the Court, for execution upon the proper stamp (if any is required by law), and the signature thereof by the Judge shall have the same effect as the execution or endorsement thereof by the party ordered to execute.

a covenant to register should be inserted in the conveyance itself, which, though inadmissable to affect the land if not registered, will yet be admissible for the *collateral* purpose of proving the covenant to register, in an action for damages for breach thereof (*Sham Narain Lal* v. *Khimajit Matoe*, IV B. L. R. F. B. 1: see also *Mark Ridded Currie and another* v. *S. V. Mutu Ramen Chetty and another*, III B. L R. A. C. 126).

Unregistered document, the registration of which is compulsory, admissible for collateral purpose.

Returning now to Section 49 of the Registration Act, the words "*of any transaction affecting such property or conferring such power*" are new and important. The effect of these words is, that documents, the registration of which is compulsory, although inadmissible, unless registered, as evidence of any transaction affecting immovable property or conferring a power to adopt, will yet be admissible for other purposes. The principle here involved had been established by several decisions under the former Acts, and the addition of the above words acknowledged the policy and correctness of these decisions. In *Sham Narain Lal* v. *Khimajit Matoe*, IV B. L. R. F. B. 2, the defendant had borrowed a sum of money from the plaintiff on a mortgage, a lease to the plaintiff's son forming part of the transaction. This lease contained a covenant for registration which the defendant refused to perform. The plaintiff, being therefore unable to acquire a title in the mortgaged property, brought his action for recovery of the money advanced, together with interest. It was objected that the mortgage lease was inadmissible as evidence because not registered: but a Full Bench of the Calcutta High Court held it admissible to prove the agreement to register. It was observed that the defendant could not be allowed to avail himself of the non-registration of the document for the purpose of protecting himself in a suit against him for a breach of his covenant to register: that, if such were the law, the plaintiff would be without a remedy, and the grossest injustice might be perpetrated. In *Lachmipat Singh Dugar* v. *Mirza Khairat Ali*, IV B. L. R. F. B. 18, the instrument was a bond securing the re-payment of money lent, and also assigning certain immovable property by way of security for this repayment. The plaintiff sued on the bond for the recovery of the money only: and a Full Bench held that the document was admissible simply for the purpose of enforcing against the obligor personally the payment of the money secured by it, although without registration it would not be admissible as evidence to prove that the obligee was entitled to the security of the land. See also the following cases:—*Nilmadhab Singh Das and others* v. *Fatteh Chand Sahu*, III B. L R. A. C. 310: *Sib Persad Das* v. *Annapúrna Dayi*, III B L. R. A. C. 451: *Udai Chand Jana* v. *Nitei Mandal*, IX W. R. 111: *Gopal Persad* v. *Nandarani*, I B. L. R. A. C. 192: *Batta Kristo Das* v. *Khetra Chandra*

Bhattacharjya, VI B. L. R. Appen. 69: *Dinanath Múkherjí* v. *Debnath Malik and another*, V B L. R. Appen 1: *Eshrí Rai and others* v. *Bindút Rai and others*, IV N-W-P. Rep. 60: *Sita Kalwar* v. *Jagarnath Persad*, id. 170.

Admission.

When the fact is admitted, to prove which it would be necessary to use in evidence a document, which has not been registered, although registration thereof is by law compulsory, the non-registration cannot affect the decision of the case. The question of registration becomes material only when it is sought to use the document in evidence (*Syud Reza Alí* v. *Bhikan Khan*, VII W. R. Civ. Rul. 334: *Chedambaram Chetty* v. *Karunalya Valangapuly Taver*, III Mad. H. C. Rep. 342). It must, however, be very doubtful whether, if the document itself were put in, any admission of its execution would stand in the stead of registration. There is a difference between admitting the fact to prove which the document is sought to be used and admitting the document itself when put in. Where in consequence of the admission it becomes unnecessary to use the document at all, the fact of non-registration is no doubt immaterial: but it is submitted that it would be otherwise where the document is used.

Priority of Registered over Unregistered documents.

Instruments which create, declare, assign, &c., any right, title, or interest of a value *less than one hundred rupees* to or in immovable property *may* but must not be registered. Although unregistered, they will be admissible in evidence, and full force and effect will be given to them; but when they come into opposition with *Registered documents*, whether of the same nature or not, affecting the same property, preference and prior effect are given to the latter (Section 50). This rule has, however, no application where the unregistered document is a decree or order of Court.[1] Even when registration is not made *compulsory* by law, the importance to purchasers of having their conveyances registered is very considerable, as it is thus alone that they can make their title secure. This provision of the law will not be allowed to subserve fraud. "I am ready to admit," said Peacock, C. J., in *Sheikh Rahmatúla* v. *Sheikh Sariatúla Kagchi*, I B. L. R. F. B. 82, "that under

Fraud.

[1] The words "and not being a decree or order" in Section 50 are new. As to the advantage of registering decrees or orders, however, see Section 168 of the second schedule of the new Limitation Act, IX of 1871, which allows *six* instead of three years for execution, when the decree has been registered. Having regard to the words "*other than instruments of gift and wills*" in the parenthesis in clause 1, Section 18, it would appear that the rule has also no application to instruments of gift or wills. The former must, in every case, be registered whatever be the value of the property, (Clause 1, Section 17: and *Pritona Kolita* v. *Muttia Kolita*, II B. L. R. Appen. 46: and XI W. R. 384).

Section 50 of the Registration Act, the word "instrument"[1] refers to an honest *bonâ fide* instrument, and does not include a fraudulent one. If a man should get a fraudulent deed registered before an honest one, he could not, under Section 50, rely upon that document as an instrument. It is a well-recognized maxim of law that no man can gain title by fraud. Under the Act relating to the registration of deeds and relating to lands in Middlesex, it was held that a subsequent registered deed has no priority over an unregistered one, if the man, who held under the registered deed, knew of the sale to the holder of the unregistered deed. But that was on the principle that a person is not to benefit, if he purchases with notice of a prior *bonâ fide* sale. On the subject of fraud the following cases may be consulted: *Gauri Kant Rai* v. *Giridhar Rai*, IV B. L. R A. C. 9: *Kamizudin Haldar* v *Rajjab Ali Saha and others*, IX W. R. Civ. Rul. 528: *Mir Hetabudin* v. *Chaudhri Abdúl Sattar and others*, V R. C. & C. R. 197: *Bhikdari Singh* v. *Kanhaya Lal*, XIV W. R. 24: *Ram Chand Kumar* v. *Madhu Súdan Mazimdar*, VII W. R. Civ. Rul. 119: *Gobind Chandra Rai* v. *Purna Chandra Sen*, X W. R. 36: *Srinath Charan Das* v. *Dwarkanath Ghose*, XIV W.R.318: *Prasanna Kúmar Sandyal* v. *Mathúrnath Bannerji*, VIII B. L. R. Appen. 26 (Suit to *set aside* a document the registration of which was obtained by improper means):—and still valuable, although decided under the old law, *Srinath Bhattacharjya* v. *Ram Kamal Gangapadya and others*, X Moo. Ind. Ap. 220: *Nawab Sidhi Nazar Ali Khan* v *Ajodhya Ram Khan*, X Moo. Ind. Ap. 540.

Other cases connected with registration.

The following cases connected with the registration of documents are also useful if not important:—*Dwarkanath Mittra* v. *S. M. Sarat Kumari Dasi*, VII B. L. R. 55 (Letter depositing title-deeds and creating equitable mortgage): *Cowie and others* v. *Chatty and others*, XI W. R. 520 (Agreement to deposit deeds):—*Ishan Chandra* v. *Sujan Bibi*, VII B. L. R. 14 (Lease forming part of an usufructuary mortgage): *Haji Abdúl Vidona Jonas* v. *Haji Harone Esmile*, VII B. L. R. Appen. 22 (Agreement for lease): *Mansúr Ali* v. *Ajmat Ali and others*, IX W. R. Civ. Rul. 282 (The provisions of the law explained): *Jalú Namdar* v. *Beicha Namdar*, III B. L. R. A. C. 394 (Registered lease to take juice of date trees, *i. e.*, for *movable* property, has no priority over a previous unregistered lease): *Winterscale* v. *Gopal Chundra Seal*, III B. L. R. O. C 90 (Agreement "for the use and hire of a steam engine, boiler, and machinery-sheds and a bungalow" is for *immovable* property, and must be registered): *Girish Chandra Rai Chaudhri* v. *Srimati Amina Khatun*, III B. L. R. Appen. 125 (Objection as to inadmissibility for want of registration should be taken in Lower Court in order to

[1] "Document" has been substituted for "instrument" in the present Act.

be available in special appeal): *Girija Singh* v. *Giridhari Singh*, I B. L. R. A. C. 14 (No priority over documents executed *before* the passing of the new Registration Acts): *Dulal Bibi* v. *Nadir Saha*, XIII W. R. 446 (To the same effect): *Ram Saran Das* v. *Ram Chand*, I N-W-P. Rep. 283 (Document executed before Registration Acts, and which might have been registered thereunder, admissible though not registered): *Chatardhari Misser* v. *Narsingh Dutt Súhal and others*, IV N-W-P. Rep. 371 (To the same effect and no priority over such instrument): *Prahlad Misser* v. *Adit Narain Singh*, II B. L. R. A. C. 200 (Priority of purchaser at sale in satisfaction of registered mortgage): *Sithal Persad and another* v. *Babú Har Chand Sahú*, I N-W-P. Rep. 263 (Similar priority): *Majíd Hosen* v. *Jeawan Khewat*, IV N-W-P. Rep. 233 (Registered counterpart of lease admissible, although lease itself unregistered): *Prabharam Hazra* v. *T. M. Robinson*, III B. L. R. Appen. 49 (No stipulation to register necessary where registration is by law compulsory): *Ram Kumar Mandal and others* v. *Brajahári Mirdha*, II B. L. R. A. C. 75 (Lease without term but reserving an annual rent must be registered. See now Clause 4, Section 17, which has been altered in conformity with this case): *Radhika Persad Chandra* v. *Ram Sundar Kar*, I B. L. R. A. C. 7 (Covenant in one year's lease for renewal does not render registration compulsory): *Gúrú Das Dán* v. *Kasam Kumári Dasi*, IX W. R. Civ. Rul. 547): *Mufazzal Hosein* v. *Ghulam Amlúah*, X W. R. Civ. Rul. 196 (Priority): *Gayaram Mazimdar* v. *Madhú Sudhan Mazimdar*, IV B. L. R. Appen. 73 (Priority—Deeds of different nature): *Shama Churn Neogi* v. *Nobin Chandra Dhoba*, VI B. L. R. Appen. 1 (Agreement to convey cannot operate as a conveyance unless registered). As to the priority of registered instruments under the old law, the following cases are important:—*Maharaja Mahesur Baksh Singh* v. *Bhika Chaudhri and another*, I Jur. N. S. 122, and V W. R. Civ. Rul. 61 (Registered deed-of-sale does not invalidate prior mortgage-deed though unregistered): *Krishnasami Pillai* v. *Venkata Chella Aiyan*, III Mad. H. C. Rep. 89 (Priority of registered instrument notwithstanding notice of previous unregistered conveyance): *Syud Nazar Ali* v. *Syud Imdad Ali*, I W. R. Civ. Rul. 206 (Priority of registered over unregistered instrument, where both *bonâ fide*): *Kailas Chandra Chatterji* v. *Gopal Chandra Chatterji*, I W. R. Civ. Rul. 78 (Priority over previous verbal contract): *Hirachand Babají* v. *Bhaskar Ababhat Shende*, II Bom. H. C. Rep. 207, and *Ambika Charan Kundu* v. *Dhárm Dás Kundu*, XI W. R. Civ. Rul. 129, and *Imrit Singh* v. *Kailass Kunwar*, XI W. R. Civ. Rul. 559, and *Syud Farzand Ali* v. *Syud Abdúr Rahím*, IV W. R. Civ. Rul. 30, and *Beirab Chandra Misr* v. *Ram Chandra Bhattacharjya*, I Hay's Rep. 261, and *Mussammat Batúl* v. *Mussamma Wazíran*, VIII W. R. Civ. Rul. 300 (No priority over unregistered conveyance accompanied with possession): *Nitra Gopal Chandra* v.

Dwarkanath Malik, I W. R. Civ. Rul. 314 (Fraud): *G. Narasamma* v. *R. Gavappa*, III Mad. H. C. Rep. 270 (Fraud): *Srínath Bhattachárjya* v. *Ram Kamal Ganguli*, X Moo. Ind. Ap. 220 (Forgery and fraud).]

PART III.

PRODUCTION AND EFFECT OF EVIDENCE.

CHAPTER VII.—OF THE BURDEN OF PROOF.

Burden of proof.

101. Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist.

When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

Illustrations.

(*a.*) A desires a Court to give judgment that B shall be punished for a crime which A says B has committed.

A must prove that B has committed the crime.

(*b.*) A desires a Court to give judgment that he is entitled to certain land in the possession of B by reason of facts which he asserts and which B denies to be true.

A must prove the existence of those facts.

On whom burden of proof lies.

102. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

Illustrations.

(*a.*) A sues B for land of which B is in possession, and which, as A asserts, was left to A by the will of C, B's father.

If no evidence were given on either side, B would be entitled to retain his possession.

Therefore the burden of proof is on A.

(*b.*) A sues B for money due on a bond.

The execution of the bond is admitted, but B says that it was obtained by fraud, which A denies.

If no evidence were given on either side, A would succeed, as the bond is not disputed and the fraud is not proved.

Therefore the burden of proof is on B.

[English text-writers lay it down as one of the rules which govern the production of evidence that *the burden of proof lies on the party who substantially asserts the affirmative of the issue.* In applying this rule, the substance and effect of the issue and not merely its grammatical form must be considered. For example, in an action for *not* keeping a house in repair according to a covenant in the lease, or for *not* executing a contract in a workmanlike manner, the negative allegation contained in the case set up by the plaintiff must be proved, if denied by the defendant. In order to the right application of the rule, the two following *tests* are usually employed:—*first*, to consider which party would succeed if no evidence were given on either side: *secondly*, to examine what would be the effect of striking out of the record the allegation to be proved —bearing in mind that the *onus probandi* or burden of proof must lie on whichever party would fail, if either of these steps were pursued. The first of these tests has been adopted in the above section of the Evidence Act. The other may, however, be usefully borne in mind, as there are some cases in which its application will be of material assistance. The two tests do not lead to different results; but the desired *analysis* will in some cases be more readily effected by one, in other cases, by the other.

Rule how stated by English Text-writers.

The application of the rule to particular instances in India will be rendered more easy by being illustrated by examples taken from cases actually decided. Where the plaintiff sued upon a bond which recited the payment of the *consideration*, and the defendant admitted the execution of the bond, but denied the receipt of the consideration, it was held that it lay upon the defendant to show that the recital in the bond as to the payment of consideration was not correct (*Fallí-Bíbí* v. *Basirudí Midha*, IV B. L. R. 56 (Full Bench); *Chaudhrí Debí Persad* v. *Chaudhrí Daulat Singh*, III Moo. Ind. Ap. 347; *Saheb Perhlad Sein* v. *Babú Badhú Singh*, XII Moo. Ind. Ap. 275; *Maniklal Babú* v. *Ram Das Mazimdar*, I B. L. R. A. C. 92; *Jagat Chandra Chaudhrí* v. *Bhagwan Chandra Fatehdar*, 1 Marsh. Rep. 27; *Ragunath Dass* v. *Lachmí Narain Singh*, X W. R. 407). The following cases are no longer law:—*Mussamat Jhalú* v. *Sheikh Farzand Alí*, V W. R. Civ. Rul.

Examples taken from decided cases.

203: *Tekait Rúp Mangal* v. *Anand Rai*, III W. R. Civ. Rul. 411: *Babú Ghansam Singh* v. *Chakaurí Singh*, W. R., Jan.—July, 1864, p. 197). Where the plaintiff sued to set aside an usufructuary mortgage-deed perfected by possession, and alleged that this deed was executed to secure the amount of a previous indemnity-bond in favour of the mortgagees and for other purposes, that the conditions of this bond had not been complied with, and that therefore there was no sufficient consideration, it was held that it lay upon the plaintiff to make out the case alleged by him and to establish at least a good *primâ facie* title to the relief prayed for, so as to cast on the defendants the burden of proving the consideration for the deed: and in the absence of clear and consistent evidence to prove the plaintiff's case, the deed was sustained. It was observed that the proposition, that the mere denial of the receipt of the consideration stated is in all cases sufficient to cast upon the party relying upon the instrument the burden of proving payment of that consideration, is too wide: and that a party, who comes into Court to enforce a bond, is in a very different position from him who is suing to set aside a contract under which there has been possession and enjoyment, and of which, so far as it has yet been capable of being performed, there has been performance (*Kalí Persad Tewarí* v. *Raja Sahib Prahlad Sen*, XII Moo. Ind. Ap. 282, and II B. L. R. P. C. 122). Where a Hindú family is admitted or is shown to have been originally joint or living in a state of coparcenary, the presumption is that this state of union continues,[1] and that the ancestral property remains joint, and this well-established presumption of Hindú law can only be rebutted by showing that the family has been divided and that the property has by partition or otherwise become separate, the burden of proving which facts lies on the party asserting them (*Massamat Chitha* v. *Babú Mihin Lal*, XI Moo. Ind. Ap. 380: *Ram Chandra Dutt* v. *Chandra Kúmar Mandal and others*, XIII Moo. Ind. Ap. 181: *Pran Kissen Paul Chaudhrí* v. *Mathura Mohan Paul Chaudhrí*, X Moo. Ind. Ap. 403: *Kattama Nautchiar* v. *The Raja of Shivaganga*, IX Moo. Ind. Ap. 539: *Laximan Row Sadaseo* v. *Mullar Row Baji*, Suth. Priv. Coun. Ap. 1: *Shiú Golam Singh* v. *Baran Singh*, I B. L. R. A. C. 164: *Amrit Nath Chaudhrí* v. *Gaurí Nath Chaudhrí and others*, VI B. L. R. 232 (Priv. Coun.): *Bír Narain Sirkar* v. *Tínkaurí Nandí*, I. W. R. Civ. Rul. 316 (Suit by a member of the family for a share of the joint property—plea that property was formerly joint, but that partition had taken place—proof of partition held to lie on

When partition is alleged among Hiúdus.

[1] It may be said that joint-tenancy is presumed by law to be the primary state of every Hindú family. See I Strange's Hindú Law, 225, and *Appovier* v. *Ram Sabba Aiyan*, XI Moo. Ind. Ap. 75.

defendant): *Bissambhar Sirkar* v. *Súradhaní Dasí*, III W. R. Civ. Rul. 21: *Manmohiní Debí* v. *Súdhamaní Debí*, id. 31: *Gúrú Persad Mukherji* v. *Kalí Persad Mukherji*, V W. R. Civ. Rul. 121: *Trílochan Rai* v. *Raj Kissen Rai*, id. 214).

And, in consequence of the same presumption, the burden of proof lies on a member of a Hindú family who claims any portion of the property as self-acquired (*Strí Rájá Yanamala Venkayamah* v. *Strí Rájá Yanamala Búchia Vankandara*, XIII Moo. Ind. Ap. 333: *Ram Persad Tewarí* v. *Sheochurn Dass and others*, X Moo. Ind. Ap. 491: *Lalla Beharí Lalla and others* v. *Lalla Madha Persad and others*, VI W. R. Civ. Rul. 29: *Sheo Rattan Kunwar* v. *Gour Beharí Bhakat and others*, VII W. R. Civ. Rul. 449: *Radharuman Kúndú and others* v. *Phúlkumarí Bíbí and others*, X W. R. Civ. Rul. 28: *Nilmaní Bhúya* v. *Rájá Gunga Narain Sabar Rai*, I W. R. Civ. Rul. 334: *Bipro Persad Mytí* v. *Kena Dayí*, V W. R. Civ. Rul. 82: *Ambika Charan Set* v. *Bhagabatí Charan Set*, III W. R. Civ. Rul. 173. (Suit for share in joint family property—denial that property was joint within period of limitation, and allegation of separation. Held that plaintiff must show joint enjoyment within the period of limitation, which having been done, it lay on defendant to prove the alleged separation): *Anand Mohun Rai and others* v. *Lamb and others*, Marsh. Rep. 169: *Srímatí Jadumaní Dasí* v. *Gungadhar Seal*, I Boul. Rep. 600: *Bainí Singh and others* v. *Bharth Singh and others*, I N-W-P. Rep. 162: *Nand Ram and others* v. *Chútú and others*, id. 255: *Dabí Sahai and others* v. *Sheo Dass Rai*, id. 285: *Gopí Kristo Gosen* v. *Ganga Persad Gosen*, VI Moo. Ind. Ap. 53). Where there has been partition, the burden of proving re-union is on the party alleging it (*Raja Surananí Venkata Gopala Narasimha Rai Bahadúr* v. *Raja Suramani Lakshmí Venkama Rai*, III B. L. R. P. C. 41). So if one of several brothers, who have separated in food and made a partition of estate, come into Court alleging that a particular portion of what was originally joint property has remained joint, notwithstanding the general partition, the burden of proof will lie on him (*Ram Gobind Kúnd and others* v. *Syud Hosen Alí and others*, VII W. R. Civ. Rul. 90; and see *Mussamat Súhbahdar Dasí* v. *Boloram Rewan*, W. R. Special No. 57, where the whole property was self-acquired and the burden of proof was held to lie on the person seeking a share and alleging the estate to be joint). A person claiming under a deed-of-gift from a Hindú widow, and alleging the property, the subject of such gift, to be the widow's *stridhan* must prove this (*Srímatí Chandra Maní Dasí* v. *Jai Kissen Sircar*, I W. R. Civ. Rul. 107). When a Hindú widow mortgages or alienates property, which, in the ordinary course of things, would descend to the reversionary heirs on her death, it lies upon those who derive their title from her to show that the alienation or

In cases of alienation by Hindú widow, &c.

mortgage was made for a purpose for which a Hindú widow is by Hindú law competent to charge the estate (*Cavaly Vencata Narrainapah* v. *The Collector of Masulipatam*, XI Moo. Ind. Ap 619: *The Collector of Masulipatam* v. *Cavaly Vencata Narrainapah*, VIII Moo. Ind. Ap. 529). So, where the widow or other guardian of a Hindú minor alienates or charges the estate or any portion of it, the person relying upon this charge or alienation must show that there was a necessity therefor, or at least that he had good ground for supposing that the transaction was for the benefit of the minor (*Lalla Bansidhar* v. *Kúnwar Bindeserí Dutt Singh*, X Moo. Ind. Ap. 455: *Hanúman Persad Panday* v. *Mussamat Babúí Manraj Kunwarí*, VI Moo. Ind. Ap. 394: *Madhu Dyal Singh* v. *Galbar Singh and others*, IX W. R. Civ. Rul. 511). The power of the manager for an infant heir to charge the estate is under the Hindú law a limited and qualified power. It can only be exercised rightly in a case of need, or for the benefit of the estate. But where in the particular instance the charge is one that a prudent owner would make in order to benefit the estate, the *bonâ fide* lender is not to be affected by the precedent mismanagement of the estate. The actual pressure on the estate, the danger to be averted, or the benefit to be conferred upon it in the particular instance, is the thing to be regarded. If such danger have arisen from any misconduct to which the lender has been a party, he cannot take advantage of his own wrong, to support a charge in his own favour against the heir, grounded on a necessity which his wrong has helped to cause. Where it is not shown that the lender has acted *malâ fide*, he will not be affected, although it be shown that with better management the estate might have been kept free from debt. The lender is bound to inquire into the necessities for the loan, and to satisfy himself as well as he can, with reference to the parties with whom he is dealing, that the manager is acting in the particular instance for the benefit of the estate. If he does so inquire and acts honestly, the real existence of an alleged sufficient and reasonably-credited necessity is not a condition precedent to the validity of his charge; and under such circumstances he is not bound to see to the application of the money. Money to be secured on an estate being obtainable on easier terms than a loan which rests on mere personal security, the mere creation of a charge securing a proper debt is not to be viewed as mismanagement. The purposes for which a loan is wanted are often future as respects the actual application, and a lender can rarely have, unless he enters on the management, the means of controlling and rightly directing the actual application; and a *bonâ fide* creditor, who has acted honestly and with due caution, ought not to suffer, should it turn out that he has himself been deceived. A lender of money may reasonably be expected to prove the circumstances connected with his own particular loan, but cannot reasonably be expected

to know or to come prepared with proof of the antecedent economy and good conduct of the owner of an ancestral estate. If he prove, therefore, the circumstances of his own particular loan so as to show that he acted honestly, that he made due and proper inquiry, and that he had reasonable ground for believing that the transaction was for the benefit of the minor and his estate, he will sufficiently have discharged the burden cast upon him. Beyond this it is impossible to lay down any general and inflexible rule as to the person on whom should be placed the burden of proving that any particular alienation was *bonâ fide*. The presumption proper to be made will vary with circumstances, and must be regulated by and dependent upon them (*Hanuman Persad Panday* v. *Mussamat Babúí Manraj Kunwarì*, VI Moo. In. Ap. 419, 423. See also *Rúp Narain Singh and others* v. *Gangadhar Persad Narain and others*, IX W. R. Civ Rul. 297: *Nand Kúmar Singh and others* v. *Ganga Persad Narain Singh*, X W. R. Civ. Rul. 94: *Lúlú Singh and another* v. *Rajendra Saha*, VIII W. R. Civ. Rul. 364: *Mussamat Bhúram Koer and others* v. *Saheb Madí and others*, VI W. R. Civ. Rul. 149: *Umacharan Banerjí* v. *Haradhan Mazímdar*, I W. R. Civ. Rul. 347: *Jagdel Narain Sahai* v. *Lalla Ram Prokash*, II W. R. Civ. Rul. 292: *Dagdú* v. *Kamble*, II Bom. Rep. 369). Where a person contends for a particular construction of a document, which is not the *primâ facie* construction, and which is contrary to the Hindú law and to the established custom of construing documents in the particular part of the country, the burden of proof lies on the person who contends that the contract should be governed not by general but by particular rules (*Maharajá Tej Chand Bahadúr* v. *Srîkanth Ghose and others*, III Moo. Ind. Ap. 261). When a person alleged that a certain zemindarí was an indivisible raj, and that he was entitled to succeed to the whole, it was held that it lay on him to prove these allegations (*Ghírdharí Singh* v. *Kulahal Singh and others*, II Moo. Ind. Ap. 344). When a person relies on a local usage regulating the right to land, the subject of alluvion or diluvion (see Section 2, Ben. Reg. XI of 1825, and *ante*, p. 88), the burden of proving such local usage lies upon him (*Rai Manick Chand* v. *Madharam and others*, XIII Moo. Ind. Ap. 1). A purchased a *talúk* at a sale in execution of a decree obtained by a judgment-creditor. The assignee of another judgment-creditor, who had obtained a decree in a separate suit against the property, brought a suit against the purchaser to set aside the sale, on the ground that the purchase was not *bonâ fide*, being made in collusion with the judgment-debtors and *benamí* for them. It was held that the burden of proof lay on the plaintiff to establish the affirmative issue that the money for the purchase of the *talúk* was supplied by the judgment-debtors, or a third party for them, and not by the purchaser (*Srimanchandra Deo* v. *Gopal Chandra Chakravartti*, XI Moo. Ind. Ap. 28). As to the burden of proof in

cases of alleged *benamí* purchases, the following cases may also be consulted:—*Bindú Basiní Debí* v. *Piyarí Mohun Bose and others*, VI W. R. Civ. Rul. 312: *Rajah Chandranath Rai* v. *Ramjai Mazímdar* (Privy Council), VI B. L. R. 304: *Munshí Bazlúr Rahím* v. *Shamsúnissa Begum, and Jadonath Bose* v. *Shamsúnissa Begum*, XI Moo. Ind. Ap. 602 (The habit of holding land *benamí* is inveterate in India, but that does not justify the Courts in making every presumption against apparent ownership): *Deo Nath and another* v. *Pír Khan* and *Ramzan Khan*, IV N.-W.-P. Rep. 16 (The burden of proof is on the person who maintains that the apparent state of things is not the real state of things): *Liakat Alí and others* v. *The Court of Wards*, X W. R. Civ. Rul. 423). Where it is sought to prevent the possession of the legal Hindú heir and to change the usual course of inheritance on the alleged ground of an adoption having been made, it lies upon the party setting up this title against the entrance of the legal heir to prove the adoption both as regards the power of the adoptor and also as regards the fact of the adoption if it be questioned (*Tarini Churn Chaudhrí* v. *Saroda Sundarí Dasí*, III B. L. R. A. C. 159). This is a strong case, the heir being the plaintiff in a suit to recover possession, and having alleged fraud, of which no proof was given. Where the reversionary heir sued *in the lifetime of the widow* for a declaration that an adoption made by her was invalid, it was held that it lay on him to prove such invalidity (*Brojo Kishorí Dasí* v. *Srínath Bose*, IX W. R. Civ. Rul. 463).

Two Classes of *Lakheraj* Grants.

Proprietors of land in the Bengal Presidency are concerned with two classes of *lakheraj* or revenue-free grants of land, *viz.*:—I. Grants *made previous to the* 1*st December*, 1790, *and not exceeding one hundred bígahs*, the revenue of which (when adjudged invalid) was by Section 6, Ben. Reg. XIX of 1793 made over to the persons responsible for the discharge of the revenue of the estate within the limits of which the lands are situate. The gift of this revenue was an act of liberality on the part of Government, inasmuch as these grants had been expressly excluded from the decennial and permanent settlements. The former *lakheraj*-holder was not dispossessed, but was allowed to hold the land as a dependent *talúk*, subject to the payment of revenue.—II. Grants *made after the* 1*st December*, 1790, and *whether exceeding or under one hundred bígahs*. These grants (unless made by the Governor-General in Council) were declared to be in all cases null and void, and, as they had been included within the limits of permanently-settled estates, the proprietors of such estates were by Section 10 of Ben. Reg. XIX of 1793 authorized and required to *dispossess* the alleged grantees, annex the lands to their estates, and collect the rents thereof. With respect to the *first class*, proprietors were expressly required by law (Section 11,

Reg. XIX of 1793) to institute suits in the Civil Courts for the recovery of the revenue made over to them by Government. With respect to the *second class*, proprietors were formerly allowed themselves to dispossess the alleged revenue-free holders, but the difficulty of doing so induced resort to the Courts in these cases also: and finally this resort was made compulsory (Section 28 of Act X of 1859). There is, however, an important difference as respects the burden of proof in each class of cases. In the first class, or where the allegation is that the *lakheraj* tenure was created before the 1st December, 1790, the burden of proof is on the alleged *lakherajdar* or person setting up the revenue-free title (*Umesh Chandra Rai* v. *Dakhina Sundari Debya and others*, W. R. Special Number, 95 (Suit for resumption); *Murúbbí Sahú* v. *Latú Kúmar*, alias *Dyebati Kúmar and others*, id. 70: *Rajà Rádhá Krishna Singh* v. *Radhá Mangí*, Sev. Aug.—Dec., 1863, p. 366 (Suit for resumption): *Lalla Síblal and others* v. *Sheikh Golam Nabí and others*, Marsh. Rep. 255 (Purchaser of *lakheraj* tenure at sale in execution): and see Clause 3, Section 3, Ben. Reg. XIV of 1825.

Burden of Proof in the First Class of Cases.

In the second class of cases, on the other hand, or when the allegation is that the *lakheraj* tenure was created *after the 1st December*, 1790, the burden of proof is on the zemindar or proprietor to show that the land claimed as *lakheraj* is part of his *mâl* or *rent-paying* estate, and was assessed with the public revenue at the time of the Decennial Settlement. This is generally done by showing that rent has been paid for the land in question at some period subsequent to 1790 (*Khelal Chundra Ghose* v. *Púrna Chandra Rai and others*, II W. R. Civ. Rul. 258: *Behari Lal Rai* v. *Kalí Dass Chandra*, VIII W. R. Civ. Rul. 451: *Hera Lal Seal* v. *Petambar Mandal*, Sev. Aug.—Dec., 1863, p. 171: *Babú Mahabír Persad* v. *Babú Amrao Singh*, I N-W-P. Rep. Civ. Rul. 167 (Case by a zemindar under Section 28, Act X of 1859): *Babú Parsidh Narain Singh* v. *Bissessir Dyal Singh*, VII W. R. Civ. Rul. 148 (Suit by zemindar to obtain a declaration that land, sold in execution as *lakheraj*, was his *mâl* land): *Tarini Persad Ghose* v. *Kalíchurn Ghose and others*, Marsh. Rep. 215 (Suit to recover possession of 93 *bígahs* of land, held as *lakheraj*, but asserted by plaintiffs to belong to their rent-paying villages): *Harihar Múkherji* v. *Abbas Alí Khan and others*, Sev. Rep. Aug.—Dec., 1863, p. 875: *Rájá Syud Ahmed Reza* v. *Rájá Inayat Hosen*, I W. R. Civ. Rul. 330: *Gumaní Kazí* v. *Harihar Múkherji* (Full Bench), W. R. Special No. 115, and Marsh. Rep. 523 (Suit for enhancement of rent—defence that part of the land was *lakheraj*): *Motí Lal Aduck and others* v. *Jadopati Dass*, II W. R. Act X Rul. 44 (Similar to last case): *Bissessur Chakravartti and others* v. *Umachurn Rai*, VII W. R. Civ. Rul. 44 (Similar): *Mirtanjai Chakra-*

Burden of Proof in Second Class of Cases.

vartti v. *Rájá Bardakant Rai*, II R. C. & C. R. Rent Rul. 21 (Similar): *Kristo Mohan Patar* v. *Hari Shankar Múkhapadya*, III R. C. & C. R. Rent. Rul. 43 (Difficulty of zemindar's discharging the burden of proof, when the plea of *lakheraj* in answer to a suit for enhancement relates to a small portion of the land only):[1] *Nehal Chandra Mistarí* v. *Harí Persad Mandal*, VIII W. R. Civ. Rul. 183 (Suit for enhancement of rent—plea and *primâ facie* evidence that part of the land was *lakheraj*): *Sib Narain Rai* v. *Chidam Dass Beiragí and others*, VI W. R. Act X Rul. 45: *Ram Kúmar Ghosal* v. *Debí Persad Chatterjí*, VI W. R. Act X. Rul. 87: *Dhan Maní Debya* v. *Satargan Seal and others*, id. 100: *Gangadhar Singh* v. *Bimola Dasí*, V W. R. Act X. Rul. 37: *Mohamed Azsar Alí* v. *Nasír Mahomed and others*, III B. L. R. A. C. 304 (Plea that all the *mâl* land had been relinquished, and that residue was *lakheraj*): *Srídhar Nandí* v. *Braja Nath Kúndú Chaudhrí and others*, II B. L. R. A. C. 211 (Similar to last case, defendant-ryot should give some *primâ facie* evidence that land is really *lakheraj*): *Matanginí Debya* v. *Mahomed*, alias *Búrí Meea*, Suth. Rep. Jan.—July, 1864, Rent. Rul. 30: *Babú Rajkissen Múkherjí and others* v. *Babú Jaikissen Múkherjí and others*, id. 119: *Hera Ram Bhattacharjya* v. *Ashraf Alí*, IX W. R. Civ. Rul, 103: *Prodhan Gopal Singh and others* v. *Bhúp Rai Ojha and others*, IX W. R. Civ. Rul. 570: *Matí Lal* v. *Janakí Rai*, V N.-W.-P. Rep. 364: *Maharaja Ramnath Singh Bahadúr* v. *Haro Lal Panday and others*, VIII W. R. Civ. Rul. 188 (Suit for a *kabúliyat*): *Harihar Múkhapadhya* v. *Madab Chundra Babú* (Privy Council), VIII B. L. R. A. C. 566 (The plaintiff *zemindar* must give some evidence that the land was once his *mâl*. His *primâ facie* case once proved, the burden of proof is shifted on the defendant, who must make out that his tenure existed before December 1790). If the defendant ryot plead that part of the land is *lakheraj*, but do not point out what part, the plaintiff cannot be called upon to discharge the burden of proof until he do so (*Rajá Satta Charan Ghosal* v. *Tarini Charan Ghose*, III W. R. Civ. Rul. 178.)[2] The above general rule in this class of cases

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[1] In *Gúrú Persad Rai and others* v. *Jagobandú Mazimdar and others* (W. R. Special Number, 15), which was a suit for a *kabúliyat*, a Full Bench held that the tenant having admitted that plaintiff was his landlord for a portion of the land, this was sufficient *primâ facie* evidence of his being plaintiff's ryot to throw upon him the burden of proving his special plea of *lakheraj* as to the remainder. "Otherwise," it was said, "every ryot might meet every rent case by a false plea of proprietary title."

[2] A similar rule has been applied to *chaukidárí Chakeran* land, and long possession has been held to throw upon the zemindar the burden of proving that the lands in suit were the private lands of the zemindar, and were not set apart at the Decennial Settlement as *chaukidari chakeran*, (*Múkta Keshi Debí Chaudhrain* v. *The Collector of Múrshedabad*, IV W. R. Civ. Rul, 30).

does not apply when the plaintiff seeking to assess rent on land claimed as *lakheraj* is a *purchaser at a sale for arrears of Government revenue.* The defendant must here prove that the land has been held as *lakheraj* since 1790 (*Sham Lal Ghose* v. *Sekundra Khan*, III W. R. Civ. Rul. 182). Where, however, the alleged *lakherajdar* comes into Court as plaintiff to obtain a decree declaratory of his *lakheraj* title, the burden of proof is on him to prove this title, and no proof of possession for years, unless carried back previous to 1790, will shift the burden to the zemindar (*Ram Jíban Chakravartti* v. *Persad Shar and others*, VII W. R. Civ. Rul. 458). This case must be distinguished from *Man Mohíní Dasí and others* v. *Jaikissen Múkherjí and others*, W. R. Special Number, 174, in which the zemindar had ousted the alleged *lakherajdar* without resorting to the Courts; and, when the latter brought his action to recover possession, it was held that the burden of proving the land to be *mál* or rent-paying lay on the zemindar. To have decided otherwise would have been to allow the zemindar by his own wrongful act to shift the burden of proof. To the same effect are *Budha Mudha and others* v. *Sheikh Kheirat Alí and others*, V W. R. Civ. Rul. 269: *Rájá Pertab Chundra Singh* v. *Síb Das Kayat and others*, I W. R. Civ. Rul. 111: *Jaikissen Múkherjí* v. *Piyarí Mohun Dutt and others*, VIII W. R. Civ. Rul. 160: *Sheikh Goberdhan and others* v. *Sheikh Tafail and others*, VI W. R. Civ. Rul. 190: *Rájá Pertab Chandra Singh* v. *Síb Das Kayat*, I W. R. Civ. Rul. 111: *Ram Lal Das* v. *Utum Churn Das*, Sev. Aug.—Dec. 1863, p. 704: *Srímatí Uma Sundarí Thakuráni* v. *Kishorí Mohan Banerjí and others*, VIII W. R. Civ. Rul. 238.

Suit by *Lakherajdar.*

When a landlord sues his tenant for enhancement of the rent previously paid by him, the burden of proof is on the landlord to establish the ground (see Section 17, Act X of 1859, and Section 18, Act VIII (B. C.) of 1869), on which he alleges that he is entitled to such enhanced rent (*Púlin Beharí Sen* v. *Watson and Co.*, IX W. R. Civ. Rul. 190 (Allegation that productiveness of the soil had been increased otherwise than by the agency or at the expense of the ryot): *Rajkrishna Múkherjí* v. *Kalí Charan Dhobain and others*, VI B. L. R. App. 122 (Allegation that produce and productive powers of land have increased otherwise than by the agency or at the expense of the ryot): *Golam Alí* v. *Gopal Lal Thakur*, IX W. R. Civ. Rul. 65 (Excess area—increase of productiveness of soil and of value of the produce): *James Hills* v. *Jendar Mandal*, I W. R. Civ. Rul. 3. If, however, the defendant ryot, without objecting to the enhanced rate of rent claimed, plead that the increase in the productiveness of the soil is due to his agency, the burden of proof will lie on him to show that such is the case (*Nobin Kissen Bose* v. *Shafatúlah* I W. R. Civ. Rul. 24). When the defendant *ryot* denied his liability to

Suits for Enhancement of Rent.

enhancement on the ground that he held a *mokurररí pattá*, the burden of proving this *pattá* was held to lie on him (*Prannath Rai Chaudhrí* v. *Mohihúdín Ahmed*, VI W. R. Act X Rul. 39): and where he pleaded, that rent was assessed on land covered by hedges and ditches, and forming the boundaries between fields, which land was, according to custom, exempt from rent, it was held that the burden of proving such custom lay on him (*Karú Chaudhrí and another* v. *Jaiyessir Nundí*, VI W. R. Act X Rul. 46). When a *ryot*, on whom a notice of enhancement has been served, takes the initiative and brings a suit to contest the grounds of enhancement set forth in the notice, the burden of proof will lie on him (*Prithí Ram Chaudhrí Rai Bahadúr* v. *Chidum Chandra Saha*, VIII W. R. Civ. Rul. 8: *Ganga Naram Chaúdhrí* v. *Kofa Pali*, XI W. R. Civ. Rul. 377: but see *Dinonath Bose Malik* v. *Jageshir Mandal*, I. W. R. Civ. Rul. 154). When a *talúk* was shown to have been in existence and so *capable* of *being registered* at the time of the Decennial Settlement, this was held to be sufficient to throw upon the plaintiff landlord seeking to enhance the rent, the burden of showing that the *talúk* had been held at a variable rent (*Radhika Chaudhrain and others* v. *Bamasundarí Dasí*, IV B. L. R. P. C. 8, and see Section 51, Bengal Reg. VIII of 1793). When in answer to a suit for enhanced rent it is pleaded that the rent has not been changed since the time of the Permanent Settlement, and is therefore not liable to enhancement (see Sections 3, 4, 15, and 16 of Act X of 1859, and Sections 3, 4, 16, and 17 of Act VIII (B. C.) of 1869), it lies upon the party seeking the benefit of the *twenty years'* presumption to prove that the rent has not been varied for twenty years before suit; and, when he has discharged this burden of proof, it lies upon the landlord to show that the rent has varied since the Permanent Settlement (*Rasmaní Debya* v *Haronath Rai*, I W. R. Civ. Rul. 280).

Abatement of Rent.

When the defendant in a suit for arrears of rent claims abatement for a portion of the land said to have been diluviated, the burden of proving the diluvion is on him (*Thomas Savi* v. *Obhoy Nath Bose*, II W. R. Act X Rul. 27). So when the defendant in a suit for arrears of rent alleges remission, it lies on him to prove such remission (*Banwarí Lal* v. *J. Furlong*, IX W. R. Civ. Rul. 239).

Fraud.

It is a general rule that fraud cannot be presumed and that the burden of proving that any transaction has been effected by fraud and misrepresentation lies upon the person seeking to impeach its validity on these grounds (*Rajendra Narain Rai and another* v. *Bejai Gobind Singh*, II Moo. Ind. Ap. 181: *Achanth Singh and others* v. *Kissen Persad Singh and others*, W. R. Jan.—July, 1864, p. 37: *Mussumat Suhúdar Koer* v. *Jai Narain Singh*, I W. R. Civ. Rul. 326:

Anand Moyí Debya v. *Síbdyal Banwarí*, II W. R. Civ. Rul. 2: *Girish Chandra Chatterjí and another* v. *Mohesh Chandra Nyalankar*, X W. R. Civ. Rul. 173: *Ram Gatí and others* v. *Mumtaj Bíbí and others*, X W. R. Civ. Rul. 280: *Lalla Rudra Persad* v. *Bínod Ram Sen and others*, X W. R. Civ. Rul. 321). So the burden of proof lies upon a person who alleges that an instrument was obtained by duress, intimidation, &c. (*Motilal Upadhya* v. *Jagarnath Gurg*, 1 Moo. Ind. Ap. 1: *Raní Parvatha Vardhay Nauchiur* v. *Jayádvera Ramakamera Ettyapa Naicker*, VII Moo. Ind. Ap. 441). The observations of their Lordships of the Privy Council in the case of *Jodonath Bose* v. *Shamsúnissa Begam*, XI Moo. Ind. Ap. 602, may well be borne in mind in connection with this subject.—"The habit may be superinduced by the manifold cases of fraud with which they have to deal; but Judges in India are, perhaps, somewhat too apt to see fraud everywhere."

Disputed Boundary.

Where a plaintiff seeks to establish his right to land by setting aside an award made by Government officers on a revenue survey and by showing that the boundary laid down by such officers is erroneous, the burden of proof is on him and he must establish his allegations by independent evidence (*Rájá Lelanand Singh Bahadúr* v. *Maharajah Moheshur Singh Bahadúr and others*, X Moo. Ind. Ap. 81: *Rájá Lelanand Singh* v. *Rájá Mahendra Narain and another*, XIII Moo. Ind. Ap. 57). In a case of disputed boundary between a *lakheraj* tenure and a zemindar's *mâl* land, there is no presumption in favour of either party, and it lies upon the plaintiff to prove the case set up by him (*Bír Chandra Júbraj* v. *Ram Gatí Dutt and others*, VIII W. R. Civ. Rul. 209).

Limitation.

Where a plaintiff sues to recover possession of property and is met with the plea of limitation, the burden of proof is on him to show that he has been in possession at some time within the period of limitation, *i. e.*, the period allowed by law after the cause of action has arisen for bringing a suit upon such cause of action (*Denobandhú Sahai* v. *J. Furlong*, IX W. R. Civ. Rul. 155: *The Collector of Rungpore* v. *Prasanno Kúmar Takur*, V W. R., Civ. Rul. 115: *Jagadamba Chaudhrain and others* v. *Ram Chandra Deo Bakshí and others*, VI W. R. Civ. Rul. 327: *Kúnwar Nítrásar Singh* v. *Nand Lal*, VIII Moo. Ind. Ap. 199: *Bromanand Gosain* v. *The Government*, V. W. R. Civ. Rul. 136: *Búlí Singh and others* v. *Harobans Narain Singh and others*, VII W. R. Civ. Rul. 212: *Nazir Sidhí Najír Alí Khan* v. *Umesh Chandra Mitra*, II W. R. Civ. Rul. 75: *Muza Mahomed Hosein* v. *Sarahtanissa Khanum*, II W. R. Civ. Rul. 89: *Gúrú Dass Rai* v. *Haronath Rai*, II W. R. Civ. Rul. 246: *Ram Lochan Chaudhrí* v. *Jai Dúrga Dasi and others*, XI W. R. 283).

In a suit for damages for malicious prosecution, it lies on the plaintiff to prove the existence of malice and of want of reasonable and probable cause, before the defendant can be called upon to show that he acted *bonâ fide* and upon reasonable grounds (*Mahant Gaur Hari Das Adhikarí* v. *Hayagrib Das Mohant*, VI B. L. R. 371: *Dúngasí Byde* v. *Giridhárí Mull Dúgar*, X. W. R. 439). So, in a suit for damages for defamation of character, the plaintiff must start his case by showing that he was not guilty of the offence charged, before the defendant can be called upon to show that he made the imputation in good faith (*Mahendra Chandra Chakravartti* v. *Sarba Mohye Debya*, XI W. R. Civ. Rul. 534). In cases of collision at sea the master and owners of the colliding vessel, even though compelled by law to take a pilot on board, are *primâ facie* liable for damage caused by their ship, and in seeking to exonerate themselves, the burden of proof is on them to show that the neglect which caused such damage was that of the *pilot* and solely his (*The ship* "*Glencoe*," I Boul. Rep. 105).

Other cases.

Where a person purchased at an execution sale a *tora Garas Hak*, or the right to a certain annual payment made by Government, and sued to have his name entered as the *payee* thereof in the Collector's books, it was held that it lay upon Government to show that this right was inalienable (*Sambhú Lal Girdhar Lal* v. *The Collector of Surat*, VIII Moo. Ind. Ap. 1). When the Government claims as an escheat lands admittedly in the possession of the party claiming as heir, the burden of proof is on the Government to show that the last proprietor died without heirs (*Giridhárí Lal Rai* v. *The Government of Bengal*, XII Moo. Ind. Ap. 448, and I B. L. R. P. C. 44). Lands situate within the limits of a *zemindarí* are *primâ facie* considered to be a part of such zemindarí: and those who allege that they are entitled to have any such lands settled as a separate *Shikmí talúk* must make out this title (*Wise and others* v. *Bhúban Moyí Debyà and another*, X Moo. Ind. Ap. 165). Where a person sued on a Policy of Insurance, which contained certain exceptions in the event of which the assurers were not to be liable, it was held that it lay upon the plaintiff to prove that the loss did not fall within any of these exceptions (*Aga Syud Sadack* v. *Hají Jackariah Mahomed and others*, II Ind. Jur. N. S. 308). In the case of a contract to sow indigo, when it has not been sown according to the contract, not sowing is *primâ facie* evidence of dishonesty; and, if the benefit of clause 4, Section 5 of Bengal Regulation XI of 1823 be claimed on the ground that failure to sow was owing to accident or to some cause not implying fraud or dishonesty, the burden of proof is on the person who claims such benefit (*Lal Mahomed Biswas* v. *Watson & Co.*, I Ind. Jur. 3). When a claim is made by a third party under Section 246 of the Code of Civil Procedure to property attached

in execution, the burden of proof is on the claimant to show that the property was his or in his possession, and therefore not in the possession of the judgment-debtor (*Nga Tha Yah* v. *F. N. Burn*, II B. L. R. F. B. 91, overruling *Nito Kalí Debya* v. *Kripanath Rai*, VIII W. R. Civ. Rul. 358). When a judgment-creditor has obtained a writ of attachment against the property of his judgment-debtor, but such debtor has no property against which the writ can be enforced, the judgment-creditor is entitled to an order for execution of his decree by attachment of the person of the debtor, and the burden of proof is on the latter to show that he has no means of satisfying the debt, and that he has not been guilty of any misconduct, not on the creditor to show that by sending the debtor to prison some satisfaction of the debt will be obtained (*C. Seton and another* v. *A. S. Bijohn*, VIII B. L. R. A. C. 255). When a defendant asserts that a suit is overvalued, the burden of proving the truth of this assertion is on him (*Uma Sankar Rai Chaudhrí* v. *Syud Mansur Alí Khan Bahadúr*, V B. L. R. Appen. 6). When a person comes into Court under Section 230 of the Code of Civil Procedure, alleging that he has been dispossessed, in the execution of a decree, of land or other immovable property which was *bonâ fide* in his possession on his own account or on account of some person other than the defendant, and that it was not included in the decree, or if included in the decree that he was no party to the suit in which such decrêe was passed, it lies on him to prove his possession. He may, if he wish, give evidence of title beyond possession, but it is not absolutely necessary for him to do so in the first instance (*Radha Piyárí Debí Chaudhrain and others* v. *Nabin Chandra Chaudhrí* (Full Bench), V B. L. R. A. C. 708: *Mussamat Yusan Khatun* v. *Ramnath Sen*, VII B. L. R. Appen. 27: *Sharoda Mayí Chaudhrain* v. *Nabin Chandra Chaudhrí*, XI W. R. 255; *Mahomed Ausar and others* v. *Prokash Chandra Saha*, VIII W. R. Civ. Rul. 8). The burden of proving actual receipt and enjoyment of rent lies on the person intervening in a rent-suit under Section 77, Act X of 1859 (*Kishen Chandra Dass* v. *Baratí Sheikh*, II W. R. Act X Rul. 36: *Ram Bharose Singh and others* v. *Jewa Mahatún*, XI W. R. Civ. Rul. 319). In a suit to recover possession of certain property from plaintiff's vendor, who made no real defence to the suit, a third party came in and claimed the property and was made a defendant. The burden of proof as against the plaintiff was held to lie on such intervenor (*Jogodanand Misser* v. *Hamíd Rasúl and others*, X W. R. Civ. Rul. 52). When a debtor pleads tender of payment as a ground for not being charged with interest, it lies on him to prove such tender (*Rání Sharat Sundárí Debya* v. *The Collector of Mymensingh*, V W. R., Act X Rul. 69). When the defendant-ryot in a suit for rent pleads payment, the burden of proof is on him (*Pareag Lal* v. *Ram Jewan Lal*, I W. R. Civ. Rul. 264: *Kúndú Beharí Banerjí* v. *Rai Múthúranath Chaudhrí*, I W.

R. Civ. Rul. 155). A ryot claiming protection from ejectment by a purchaser at a sale for arrears of Government revenue must prove the ground (Section 37, Act XI of 1859) on which he claims such protection (*Doman Lal* v. *Padman Singh*, W. R. Jan.—July, 1864, Act X Rul. 129). When a ryot holds lands of considerable extent under a zemindar and alleges that one or two plots are held under a different title, the burden of proving this allegation has been cast upon him (*Ram Kúmar Rai* v. *Bejai Gobind Baral and others*, VII W. R. Civ. Rul. 535). When a plaintiff comes into Court and asks for a declaratory decree confirming his title, he must prove the title which he seeks to have confirmed, and cannot have a decree on the mere ground that he is in possession and that the defendants have proved no better title (*Joloke Singh* v. *Gurwar Singh*, II W. R. Civ. Rul. 167: *Rassonada Rayar* v. *Sitharamí Pillai*, II Mad. H. C. Rep. 171: *Royes Múlah and others* v. *Mudhú Súdhan Mandal*, IX W. R. Civ. Rul. 154: *Parsíd Narain Singh and others* v. *Busseshar Dyal Singh and others*, VII W. R. Civ. Rul. 148: *Madan Mohan Saha* v. *Bharat Chandra Rai*, XI W. R. Civ. Rul. 249). When the defendant impeaches the correctness of an Amín's report (see *ante*, page 145), the burden of proof is on him; and the plaintiff should not in the first instance be called upon to support its correctness (*Gauri Narain Mazimdar* v. *Madhú Súdhan Dutt*, II W. R., Act X R. 1). A plaintiff suing to set aside the sale of a *patní talúk* on the ground that the Collector acted without jurisdiction in making the sale must prove this allegation (*Kalí Kúmar Mukherjí* v. *The Maharájá of Burdwan*, V W. R. Civ. Rul. 39).]

Burden of proof as to particular fact.

103. The burden of proof as to any particular fact lies on that person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

Illustration.

(*a.*) A prosecutes B for theft, and wishes the Court to believe that B admitted the theft to C. A must prove the admission.

B wishes the Court to believe that, at the time in question, he was elsewhere. He must prove it.

[The cases given in the *Note* to the preceding Section will furnish numerous further illustrations of the rule here laid down. It may be observed that the general rule contained in Section 102 applies more especially to the whole case, while the rule contained in Section 103 will have special application to particular issues.

As instances of a provision of law that the proof of a fact shall lie upon a particular person, reference may be made to Section 89 of the Code of Criminal Procedure, which enacts that all persons shall give information of the commission of certain offences to the nearest Police officer or Magistrate, and throws upon such persons the burden of proving *reasonable excuse* for not doing so—and to Section 19 of the Indian Succession Act, under the provisions of which succession to the *movable property* of a man, who dies leaving such property in British India, is regulated by the law of British India in the absence of proof of any domicile elsewhere; the person who seeks to have the succession regulated by any other law being, therefore, under the burden of proving another domicile.]

Burden of proving fact to be proved to make evidence admissible.

104. The burden of proving any fact necessary to be proved in order to enable any person to give evidence of any other fact is on the person who wishes to give such evidence.

Illustrations.

(*a.*) A wishes to prove a dying declaration by B. A must prove B's death.

(*b.*) A wishes to prove, by secondary evidence, the contents of a lost document.

A must prove that the document has been lost.

Burden of proving that case of accused comes within exceptions.

105. When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any of the General Exceptions in the Indian Penal Code, or within any special exception or proviso contained in any other part of the same Code, or in any law defining the offence, is upon him, and the Court shall presume the absence of such circumstances.

Illustations.

(*a.*) A, accused of murder, alleges that, by reson of unsoundness of mind, he did not know the nature of the act.

The burden of proof is on A.

(*b.*) A, accused of murder, alleges that, by grave and sudden provocation, he was deprived of the power of self-control.

The burden of proof is on A.

(*c.*) Section three hundred and twenty-five of the Indian Penal Code provides that whoever, except in the case provided for by section three hundred and thirty-five, voluntarily causes grievous hurt, shall be subject to certain punishments.

A is charged with voulntarily causing grievous hurt under section three hundred and twenty-five.

The burden of proving the circumstances bringing the case under section three hundred and thirty-five lies on A.

[Section 235 of the old Code of Criminal Procedure (Act XXV of 1861) enacted that it should not be necessary to allege in the charge any circumstances for the purpose of showing that the charge did not come within any of the general exceptions contained in Chapter IV of the Indian Penal Code: and Section 236 enacted that it should not be necessary at the trial, on the part of the prosecution, to prove the absence of such circumstances in the first instance: but that the accused person should be entitled to give evidence of the existence of any such circumstances, and that evidence in disproof thereof might then be given on the part of the prosecution. Section 237 then provided that when the Section referred to in the charge contained an exception *not being one of such general exceptions*, the charge should not be understood to assume the absence of circumstances constituting such exception so contained in the Section, without a distinct denial of the existence of such circumstances. The Evidence Act expressly repealed (see Schedule) Section 237 of Act XXV of 1861. The whole of the Act was subsequently repealed by the new Code of Criminal Procedure, Act X of 1872, Section 439 of which contains provisions as to the mode in which charges are to be drawn up. This Section does not, however, expressly mention exceptions General or Special; but it is clear from its provisions, and more especially from the *Illustrations* appended thereto, that every charge is to be understood as assuming the absence of all circumstances constituting exceptions general or special. The above Section of the Evidence Act throws upon the accused the burden of proving the existence of circumstances which bring the case within any of the Special as well as any of the General Exceptions of the Penal Code. So far, then, as the Special Exceptions are concerned, an important alteration has been made in the law. With reference to "shall presume," see *ante*, page 76. In India it not unfrequently happens—it has happened many times in the course of my own experience—that a prisoner, charged with a serious offence, makes no defence except the simple plea of "not guilty,"

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and wholly fails to rely upon or to attempt to prove circumstances which undoubtedly exist and would bring his case within one of the General or Special Exceptions of the Penal Code. Himself ignorant of the law, he is probably also without means to engage the services of such legal advisers as are available. In such cases when anything transpires during the trial to show, or when it appears from the depositions of the committing Magistrate that there are or may be such circumstances, it is submitted that it falls within the duty of a Judge as defined by Sections 256 and 264 of the Code of Criminal Procedure, and by Section 165 of the Evidence Act, to elicit from the witnesses such information, or, if need be, to adjourn the case for such additional evidence as shall establish the existence of these circumstances or otherwise.]

Burden of proving fact especially within knowledge.

106. When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.

Illustrations.

(*a.*) When a person does an act with some intention other than that which the character and circumstances of the act suggest, the burden of proving that intention is upon him.

(*b.*) A is charged with travelling on a railway without a ticket. The burden of proviug that he had a ticket is on him.

Examples of this Rule.

[In the case of *Naba Kissen Mukherji* v. *Promothanath Ghose and others*, V W. R. Civ. Rul. 148, the plantiff, who was formerly *patnídár* of the village, sued for the possession of certain land which he claimed as *lakheraj*, and from which he stated that he had been ousted by the defendant, who had become *patnídár* by purchase at a sale held under Bengal Regulation VIII of 1819. Although, according to the general rule (see *ante*, pages 361, 363), it would have lain upon the defendant to show that the land was *mâl* or rent-paying after 1790, yet it was held that as plaintiff, by reason of his having been formerly *patnídár* of the village had special means of knowledge and was in a position to prove the area of the *mâl* lands, the burden of proof lay on him in the first place to show that the disputed land was not within this area. In *Ram Kúmar Rai* v. *Bijai Gobind Baral*, VII W. R. Civ. Rul. 535, the dispute was between the zemindar and his tenant. The latter held lands of considerable extent under the former, but objected that one of the two plots occupied by him had been held under a

different title. It was decided that under such circumstances it was for the defendant to prove a matter which was peculiarly within his knowledge. From these cases was distinguished *Girídhar Hari* v. *Kali Kanth Rai Chaudhri*, III B. L. R. A. C. 161, which resembled the latter of them, except in this that the defendant was not a tenant, but was sued as a trespasser and a wrong-doer. When the sons of a living father bring a suit against a creditor to get rid of a charge on the ancestral estate created by him, on the ground of his alleged misconduct in extravagant waste of the estate, the antecedents of their father's career being more likely to be in the knowledge of the sons, members of the same family, than of a stranger, the *onus* of disproving the charge may properly be placed upon them. (See the remarks of their Lordships of the Privy Council in the case of *Hanúman Persâd Panday* v. *Mussamat Babúi Manraj Kunwári*, VII Moo. Ind. Ap. 419.)

Alteration of Documents.

The alteration of documents and the effect of such alteration may well be considered in connection with the present subject. "When the instrument on its production," says Mr. Taylor, "appears to have been altered, it is a general rule that *the party offering it in evidence must explain this appearance*, if he be called upon to do so by the issue raised, and if the instrument be not admitted by his opponent under notice; because, as every alteration on the face of a written instrument renders it suspicious, it is only reasonable that the party claiming under it should remove the suspicion. If the alteration is noted in the attestation clause as having been made before the execution of the instrument, it is sufficiently accounted for, and the credit of the instrument is restored[1]..... It may be laid down as a general rule that wherever it is an *offence* to alter a document after it has been completed, the law presumes, *primâ facie*, that any alteration apparent on it was made at such a time and under such circumstances as not to constitute an offence. With respect, however, to a bill of exchange, or a promissory note, the law presumes nothing, but leaves the jury to decide, *first*, by inspecting the instrument itself, whether any alteration has been made; and, *then*, on considering the extrinsic evidence offered, at what time and under what circumstances such alteration, if any, was made. These last questions cannot be solved by the jury on the mere inspection of the writing, for juries must decide not on conjecture but on proof. The rule of law applicable to this subject is that any material alteration in a written instrument, whether made by a party or a stranger, is fatal to its validity, provided it were made after its execution, and without the

[1] As to the mode of attesting alterations in wills, see Section 58 of the Indian Succession Act, X of 1865.

privity of the party to be affected by it, and perhaps also with this additional proviso that the alteration was made while the instrument was in the possession, or at least under the control of the party seeking to enforce it. . . . . The grounds of the doctrine are twofold. The *first* is that of public policy, which dictates that no man should be permitted to take the chance of committing a fraud without any risk of losing by the event in case of detection. The *other* is to insure the identity of the instrument and prevent the substitution of another without the privity of the party concerned." (§§ 1616—1618.) The rule applies only when the party producing the instrument is seeking to enforce it or claiming an interest under it. The instrument "may be void for the purpose of taking an interest under it, but nevertheless admissible to prove a collateral fact," said Lord Abinger in a case in which an altered lease was admitted to show the terms of the holding, the relation of landlord and tenant being admitted on the record. (Taylor, §§ 1621—1622). The case of *Davidson* v. *Cooper*[1] established in England the doctrine that every material alteration of an instrument, while in the custody of the party seeking to give it effect, *even by a stranger and without the privity of either party, vitiates that instrument when relied on as the foundation of a right sought to be enforced*, and this even though the alteration was the effect of pure accident or mistake. Mr. Taylor very reasonably contends against the hardship and injustice of this doctrine, and points out that it has not been recognized by the Irish Court of Exchequer; nor in America, where the New York Civil Code allows the party producing a writing altered in a material part to show that the alteration was made by *another without his concurrence*, or was made with the consent of the parties affected by it, or otherwise properly or innocently made, or that the alteration did not change the meaning or language of the instrument. He maintains that the sound rule of law cannot be carried further than this, that any party seeking to enforce a right under a written instrument, is so far responsible for any material alteration apparent on its face, as to be bound to show that it was made either before its execution, or at a time when the instrument was not in his possession, or under his control.

Case of Material Alteration.

If the alteration be an *immaterial* one, it will, if made *fraudulently* by the party claiming under the instrument, avoid it so far as he is concerned. If, however, it have been done innocently and to no injurious purpose, it will not have this effect. In the case of *Aldous* v.

Case of Immaterial Alteration.

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[1] 11 Meeson & Welsby's Reports, 778, 799, 802; and 13, *ib.* 343.

Cornwell,[1] the words "on demand" had been added to a promissory note by the plaintiff or while the note was in his hands. It was held that this alteration did not avoid it, as the words were immaterial and merely expressed what the law would have supplied.

Indian Cases.

The following Indian cases are generally in accordance with the principles advocated by Mr. Taylor. In the case of *Petamber Manikjí* v. *Motíchand Manikjí* (before the Privy Council, 16th May, 1837), Lord Wynford said:—"If a plaintiff produces a bond in this country or any other instrument which appears to have been altered, the Court will not receive it or act upon it till it is most satisfactorily proved by all the subscribing witnesses at the least, and other evidence, that that alteration was made antecedently to the signature. There is no such evidence here, and this is the whole of the case of the plaintiff below." (I Moo. Ind. Ap. 420.) In *Madan Mohan Kúndú* v *Safima Bewa and others* (before the Calcutta High Court, Sutherland's Rulings on References from the Mofussil Small Cause Courts, p. 69), the defendant pleaded that the bond, on which the suit was brought, had been tampered with by the plaintiff and so avoided. It was held that an erasure or alteration in a document in the possession of a plaintiff, and on which he relies in support of his case, must be fully and satisfactorily explained by him, and cannot be presumed to have taken place before the execution of the document. In the case of *Mussomut Khúb Kúnwar and others* v. *Babú Múdnarain Singh and others*, IX Moo. Ind. Ap. 1, it was laid down as follows:—"It may be conceded that in an ordinary case the party who presents an instrument, which is an essential part of his case, in an apparently altered and suspicious state, must fail from the mere infirmity or doubtful complexion of his proof, unless he can satisfactorily explain the existing state of the document. But this wholesome rule admits of exceptions, if there be, *independently of the instrument*, corroborative proof strong enough to rebut the presumption which arises against an apparent and presumable falsifier of evidence, and such corroborative proof will be greatly strengthened, if there be reason to suppose that the opposite party has withheld evidence which would prove the original condition and import of the suspected document."]

Burden of proving death of person known to have been alive within thirty years.

107. When the question is whether a man is alive or dead, and it is shown that he was alive within thirty years, the burden of proving that he is dead is on the person who affirms it.

[1] L. R. 8 Q. B. 573.

Burden of proving that person is alive who has not been heard of for seven years.

108. [Provided that when[1]] the question is whether a man is alive or dead, and it is proved that he has not been heard of for seven years by those who would naturally have heard of him if he had been alive, the burden of proving that he is alive, is [shifted to[2]] the person who affirms it.

[According to Hindú law, *twelve* years must have elapsed before an absent person, of whom nothing has been heard during this period, can be presumed to be dead; and no right can accrue to any person as heir of such an absent person until the expiry of *twelve* years from the date on which he was last heard of (*Janmajai Mazimdar* v. *Keshab Lal Ghose and another*, II B. L. R. A. C. 134: *Gúrú Das Nag and another* v *Matilal Nag and others*, VI B. L. R. Appen. 16). According to Mahomedan Law, *ninety* years from his birth must have elapsed before the death of a missing person can be presumed (Hedaya, Book XIII). The effect of the above two Sections will be to establish one uniform rule in all cases.]

Burden of proof as to partnership, tenancy, and agency.

109. When the question is whether persons are partners, landlord and tenant, or principal and agent, and it has been shown that they have been acting as such, the burden of proving that they do not stand, or have ceased to stand, to each other in those relationships respectively, is on the person who affirms it.

Partnership.

[As to Partnership, see Chap XI, Sections 239—266 of the Indian Contract Act, IX of 1872. Section 264 enacts that persons dealing with a firm will not be affected by a dissolution, of which no public notice has been given, unless they themselves had notice of such dissolution. The party alleging that notice was given will, as a general rule, have to prove this allegation.

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[1] The words in brackets were substituted for "When" by Section 9 of the amending Act, XVIII of 1872.

[2] The words in brackets were substituted for "on" by Section 9 of the amending Act, XVIII of 1872.

Agency.

As to the relation of Principal and Agent, see Chap X, Sections 182—238 of the same Act. Section 206 enacts that reasonable notice must be given of revocation or renunciation, otherwise the damage thereby resulting to the principal or the agent, as the case may be, must be made good to the one by the other. Section 208 enacts that the termination of the authority of an agent does not, so far as regards the agent, take effect before it becomes known to him; or, so far as regards third persons, before it becomes known to them

Landlord and Tenant.

Where two persons set up rival claims to the tenancy of the same piece of land under the same landlord, and one of them admitted the previous tenancy of the other, but pleaded that he had relinquished the land, which was upon this leased to himself, it was held that it lay upon him to prove the relinquishment which he thus alleged (*Kissen Chandra Saha and others* v. *Húkúm Chand Saha and others*, W. R., Jan—July, 1864, Civ. Rul. 47). With reference to Section 19 of Act X of 1859, and Section 20 of Act VIII (B. C.) of 1869, which provide for a written notice of relinquishment to be served on the landlord through the medium of the Court, it has been decided that if the tenant have taken the steps so provided by law in furtherance of his intended relinquishment, the burden of proving that he continued to hold possession of the land, notwithstanding that such steps had been taken by him, will fall upon the landlord. If, on the other hand, the tenant have not taken these steps, it will be for him to show that the landlord took possession of the land, and enjoyed the profits by holding it *khas* (*i. e*, in his own possession) or by letting it to other parties (*James Erskine* v. *Ram Kúmar Rai and others*, VIII W. R. Civ. Rul 221). In the case of *Tilak Pataik* v. *Mahabír Panday and another*, VII B. L. R, Appen. 11, it was held that the above Sections, relating to service of notice of relinquishment, have no application where the tenant holds under a lease for a definite term—that the presumption here is in favour of relinquishment on the expiry of the term—and that it is for the landlord who avers that the tenant (defendant in a suit for arrears of rent) did not so relinquish to prove that he continued to hold over. It may be a question whether this decision will continue to be law under the provisions of the above Section. It may, however, be observed that the Section is founded on a general presumption arising from the experienced *continuance*, for a longer or shorter period, of human affairs, and that whatever room there may be for such a presumption when no definite term has been fixed for the continuation of the tenancy, it would appear to be excluded by the circumstances of the case, when such a term has been fixed. The provisions of Section 114, *post*, may, perhaps, be wide enough to include such a case]

110. When the question is whether any person is owner of anything of which he is shown to be in possession, the burden of proving that he is not the owner is on the person who affirms that he is not the owner.

Burden of proof as to ownership.

[Men generally own the property which they possess, and *possession* is therefore presumptive proof of *ownership*. The rule applies to property real and personal, movable and immovable. A plaintiff seeking to eject a person from immovable property and to obtain possession thereof for himself, must in consequence recover by the strength of his own legal title, and cannot in the first instance call upon the defendant to show the title under which he holds. In the case of *Jawala Baksh* v. *Dharam Sing*, X Moo. Ind. Ap. 528, their Lordships of the Privy Council said :—"The appellant was in possession of the estate. He and his father had held continual possession of it from December, 1843, if not from October, 1842. His own possession of it had been unquestioned since February, 1845, when he was recorded as the proprietor of it. It was essential, therefore, for any party seeking to oust him from that possession to show a better title to the estate, *i. e.* a title which would give the claimant a right to the estate failing the title impeached. The judgment of the Sáder Court assumes that the title set up by the plaintiffs may be wholly bad. . . . . The effect, therefore, of the judgment is to defeat the appellant's possessory title, without giving him an opportunity of contesting the title of the party by whom he is turned out of possession. Their Lordships cannot give their sanction to this course of proceeding, which appears to them to be in violation of the legal principles which protect possession. . . . . It is difficult to estimate the full weight of the grave dangers to which so irregular a course might expose possession. They conceive that the first question which the Sáder Court ought to have decided, and which must now be decided on this appeal, is whether the plaintiffs have shown any title to this property." In the case of *Ram Ruttan Rai* v. *Farúksúnnissa Begum and Rúkya Begum*, IV Moo. Ind. Ap. 233, the defendant was in possession of certain land under a deed-of-sale from the person last seised and was forcibly ousted by the plaintiffs, who claimed under a deed-of-gift from the same person. The defendant was by an order of the Criminal Court restored to possession, the plaintiffs being directed to bring a civil suit to establish the title set up by them. They did so, and it was held in this suit that it was incumbent on them to prove their right to the land claimed by them before

Rule illustrated.

they could put the defendant to proof of his title. So in *Rájá Bardakanth Rai* v. *Babú Chandra Kúmar Rai and others*, XII Moo. Ind. Ap. 145, one of the claimants in a case of disputed boundaries was in possession by virtue of a Magistrate's order made under Act IV of 1840,[1] and it was held that it lay on the party seeking to oust him to show a better title to the land claimed than that of the party in possession. In *Sevvají Vijaya Raghanadha Valojí Kristnan Gopalar* v. *Chinna Nayana Chetti*, X Moo. Ind. Ap. 151, the plaintiff sued to recover a village in the possession of the defendant, whose title and that of his predecessors had been unchallenged for forty-four years. His allegation was that his ancestor had merely mortgaged the land to the ancestor of the defendant, and that the defendant was only an usufructuary mortgagee in possession. It was held that the *onus probandi* or burden of proof was on the plaintiff, who could only succeed by the strength of his own title and not by reason of the weakness of the defendant's title. "A plaintiff," it was said, "who alleges that his ancestor, forty-four years ago, made a mortgage to the ancestor of the present possessor of a property, and by virtue thereof seeks to dispossess the present possessor, must prove his case clearly and indefeasibly. He must succeed by the strength of his own title, and not by reason of the weakness of the opponent's. It would be contrary to all principles of law and justice, that upon such an allegation, a plaintiff should be able to require the present possessor to prove his title, and if he failed in doing so to dispossess him of the land in question." See also the following cases:—*Rájá Mohesh Narain Singh* v. *Krishnanand Misser and another*, IX Moo. Ind. Ap. 324 ("It would be monstrous to make the title to land in a purchaser depend, years after it has accrued, and possession has been enjoyed under it, on his proving the same affirmatively. In the nature of the thing all traces of the evidence may be expected, as to some of the particulars, to perish in a short time"): *Ashrafúnissa Begam* v. *Raghúnath Sahai and others*, II W. R. Civ. Rul. 267 (Suit by the alleged assignee of a mortgagor under a *zúr-i-peshgí* lease to recover possession of the land from the alleged mortgagee on payment of the alleged balance due): *Chandra Maní Chaudhrain* v. *Raj Kissore Saha*, V W. R. Civ. Rul. 246 (Suit to recover land which the plaintiff alleged that he had purchased at a sale in execution of a decree): *Púlin Behari Sen* v. *R. Watson & Co.*, IX W. R. Civ. Rul. 190 (The party who avers a title must make out such title, even if it be necessary to prove a negative in order to do so): *Mussamat Harasundari Debya and others* v. *Mussamat Amína Begum*,

[1] This Act was repealed by Act XVII of 1862. The analogous provisions of existing law will be found in Sections 530—535, Chapter XL of the Code of Criminal Procedure, Act X of 1872.

I Jur. N. S. 188: *Srimati Debya* v. *Madan Mohan Singh*, II B. L. R. A. C. 326 (Suit to recover possession of land seized in execution, sold after rejection of a claim by plaintiff, and purchased by judgment-creditor, who sold to the defendant, who ousted plaintiff). Where the plaintiff in a suit for declaration of title made out a *primâ facie* title to the property by producing the title-deeds in favour of himself, it was held that it lay upon the defendant to disprove this title (*Swarnamayi Raur* v. *Srinibash Koyal*, VI B. L. R. 145).

The rule has, however, no application when the possession has been obtained by force or fraud. A man cannot be allowed to take advantage of his own wrong in order to shift the burden of proof to his opponent. Where, therefore, the plaintiff proves that he was in possession and was ousted by the defendant otherwise than by due course of law, the burden of proving a title is shifted upon the defendant in the first instance (*Jadabnath and another* v. *Ram Súndar Surmah and another*, VII W. R. Civ. Rul. 174: *Radha Ballab Gosain and others* v. *Kissen Gobind Gossein*, IX W. R. Civ. Rul. 71: *Gaur Parey* v. *Umasundari Debya*, XII W. R. Civ. Rul. 472: *Muhesh Chandra Bandopadhya* v. *Srimati Baroda Debi*, II B. L. R. A. C. 275). Under the provisions of Section 15, Act XIV of 1859, if any person shall, without his consent, have been dispossessed of any immovable property otherwise than by due course of law, such person, or any person claiming through him, shall, in a suit brought to recover possession of such property, be entitled to recover possession thereof notwithstanding any other title that may be set up in such suit, provided that the suit be commenced within six months from the time of such dispossession. But nothing in this Section shall bar the person from whom such possession shall have been so recovered, or any other person instituting a suit to establish his title to such property and to recover possession thereof within the period of limitation provided by law. No appeal from or review of an order or decision made in a suit under this Section, is by law allowable (see Section 26, Act XXIII of 1861). The object of the Section was to discourage parties from taking the law in their own hands, and from asserting their rights by force. The result of a suit under these provisions is to restore to possession the party ousted by force, and to leave the question of title wholly untouched and open to litigation in a regular suit. When, therefore, a regular suit to establish title and recover the land is brought against the party so restored to possession, the whole burden of proof is upon the plaintiff in such regular suit; and, until he can show a title to the property, the Court will not look into the defendant's title or disturb his possession (*Múlví Meinudín* v. *Girish Chandra Rai Chaudhri*, VII W. R. Civ. Rul. 230). If he prove twelve years' undisturbed possession antecedent to the ejectment

Possessory Suit under Sec. 15, Act XIV of 1859.

under the summary order made under the above Section, this will be a good title, sufficient at least to throw upon the defendant the burden of proving a better title (*Ram Chandra Chaudhrí* v. *Brajanath Sarma*, III B. L. R. Appen. 109: *Ballabí Kant Bhattacharjya and another* v. *Dúrjadhan Sikdar and others*, VII W. R. Civ. Rul. 89). When a person ousted otherwise than by due course of law fails to avail himself within six months of the summary remedy provided by the law, and afterwards brings a regular suit to recover possession, it has been questioned whether the burden of proof ought to be laid upon him or upon the defendant. Section 15 of Act XIV of 1859, however, provides a special and a summary remedy, and doubtless was not intended to interfere with the ordinary rule that a man cannot be permitted to take advantage of his own wrongful act to shift the burden of proof upon his opponent. In this view it may well be held that, as soon as the plaintiff has proved former possession and dispossession by the defendant otherwise than by due course of law, the burden of proving a title will be on the defendant. The following cases support this view, *viz.:*— *Kháján Enayatúla Chaudhrí* v. *Kissen Sundar Surma and others*, VIII W. R. Civ. Rul. 386: *Ayesha Bíbí and others* v. *Kanhye Múlah and others*, XII W R. Civ. Rul. 146: *Shama Sundarí Debya* v. *The Collector of Malda and others*, XII W. R. Civ. Rul. 164: *Trilochan Ghose and others* v. *Kailasnath Sidhanta Bhaumik Bhattacharjya and others*, III B. L. R. A. C. 298. But see *Amír Bíbí and others* v. *Takrúnissa Begam and others*, VII W. R. Civ. Rul. 332, and on review, VIII W. R. Civ. Rul. 370: and *Ram Dutt Chaudhrí* v. *Lakkhí Koer*, XI W. R. Civ. Rul. 447. It may be scarcely necessary to observe that possession may be proved by oral evidence (*Maniram Deb* v. *Debí Charan Deb and others*, IV B. L. R. F. B. 97.)]

Proof of good faith in transactions where one party is in relation of active confidence.

111. Where there is a question as to the good faith of a transaction between parties, one of whom stands to the other in a position of active confidence, the burden of proving the good faith of the transaction is on the party who is in a position of active confidence.

Illustrations.

(*a.*) The good faith of a sale by a client to an attorney is in question in a suit brought by the client. The burden of proving the good faith of the transaction is on the attorney.

(*b*) The good faith of a sale by a son just come of age to a father is in question in a suit brought by the son. The burden of proving the good faith of the transaction is on the father.

[The rule here laid down is in accordance with a principle long acknowledged and administered in Courts of Equity in England and America. This principle is that he who bargains in a matter of advantage with a person who places a confidence in him, is bound to show that a proper and reasonable use has been made of that confidence. The transaction is not necessarily void *ipso facto*, nor is it necessary for those who impeach it to establish that there has been fraud or imposition, but the burden of establishing its perfect fairness, adequacy, and equity is cast upon the person in whom the confidence has been reposed.[1] The rule applies equally to all persons standing in confidential relations with each other. In addition to the instances of the application of the rule supplied by the *Illustrations*, the following also may be mentioned:—Where a guardian or other person standing in the place of a parent purchases or takes a gift of property from his ward before or immediately after the latter has come of age: where a minister of religion, medical attendant, or other person has, through the means of a position presenting peculiar opportunities, acquired special confidence. Agents, trustees, executors, administrators, auctioneers, and others have been held to fall within the rule. The Section requires that the party on whom the burden of proof is laid should have been *in a position of active confidence*. There is a distinction between a confidential adviser who is generally *consulted* in the management of an individual's affairs, but who takes no part in such management, and an agent, steward, or other person who undertakes an office or engages actively in the concerns of such individual and in the general management thereof. It will be important to draw a distinction between the class of cases with which this Section is concerned, and another class of cases already referred to (*ante*, p. 358). Where fraud is alleged, the rule has been clearly established in England that in the case of a stranger, that is to say, a person not standing in any confidential or fiduciary relation towards the donor, equity will not set aside a voluntary deed or donation, however improvident it may be, if it be free from the imputation of fraud, surprise, undue influence; and spontaneously executed or made by the donor with his eyes open. And it is equally clear, that in all cases where it has been proved that a mere stranger, connected with the donor by no

Principle administered in Courts of Equity.

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[1] See Story's Equity Jurisprudence, §§ 309—327: and *Huguenin* v. *Baseley*, 2 Leading Cases in Equity, 3rd *Ed.*, 504.

peculiar or fiduciary relation from which undue influence can be inferred, has, either by fraud, surprise, or undue influence, obtained from him a voluntary donation, a Court of Equity will at once set it aside; in such cases, however, *the proof of fraud, surprise, or undue influence is completely upon the donor* or person deriving title from him, for *primâ facie* the donation is valid.[1] Where an active, confidential, or fiduciary relation exists between the parties, there the burden of proof is on the donee or those claiming through him. It has further been laid down that where a person *gains a great advantage over* another by a voluntary instrument, the burden of proof is thrown upon the person receiving the benefit, and he is under the necessity of showing that the transaction is fair and honest; for, although the Courts never prevent one person from being the voluntary object of the bounty of another, yet it must be shown that the bounty was purely voluntary, and not produced by any undue influence or misrepresentation.[2] The Evidence Act does not provide specially for this last case, though it may possibly fall within the purview of Section 114, *post*.

In judging of the validity of transactions between persons standing in a confidential relation to each other, the material point to be considered is whether the person conferring a benefit on the other had competent and independent advice. The age or capacity of the person conferring the benefit and the nature of the benefit are of little importance in such cases: they are important only when no such confidential relation exists.[3]

Indian Cases.

The above principles have been acknowledged and acted upon in more than one Indian case. In *Múnshí Bazlúr Rahím* v. *Shamsúnissa Begam*, XI Moo. Ind. Ap. 551, a Mahomedan wife had brought a suit against her husband to recover the value of real and personal estate including certain Company's paper, which it was alleged was her separate property, and had been, as she lived in seclusion, endorsed and handed over by her to her husband for the purpose of obtaining the interest thereon. The defence was that the husband had purchased this paper from her, and had, on endorsement and delivery, paid her full value for the same. It was held that the husband was bound to show something more than the mere endorsement and delivery of the paper, and that, from the relations subsisting between the parties, the burden of proof was upon him to establish—*first*, that the transaction which he set up was a *bonâ fide* sale; and, *secondly*, that he had given full value for the paper. "That all these securities came to her hands whilst she

[1] II Leading Cases in Equity, 529—530.
[2] II Leading Cases in Equity, 543.
[3] II Leading Cases in Equity, 543.

was an inmate of his *zenanah*," said their Lordships; "that they all passed from her to him; that some of them remain in his possession; and that others have been traced to his creditors—is incontestable. That she came to his house a wealthy woman, and left it almost destitute, admits of no doubt. And it can scarcely be denied that transactions of this nature and magnitude between husband and wife, with such a result, require a full and clear explanation on the part of the former, supported by such evidence as shall satisfy a Court of Justice that they were conducted fairly and properly, and with a due regard to the rights and interests of the wife. Her case is, that the securities were entrusted to him for a particular purpose, *viz.*, that of receiving the interest on them for her, and that though they may have been endorsed, she never meant to transfer the property in them. His case is that he purchased them from her on several occasions, and that on their endorsement and delivery he paid her the full value for them. The principle of the judgments of the Courts below seems to be, that although the wife may have failed to establish affirmatively the precise case alleged by her, her husband having admitted the receipt of the securities from her, was bound to show something more than mere endorsement and delivery; that, the relation of the parties being what it was, it lay upon him to prove that the transactions which he set up were *bonâ fide* sales and purchases, and that he actually gave full value for what he received from her. Their Lordships are clearly of opinion that this is *a sound principle, and in accordance with the long-established practice of the Courts in India.* The Attorney-General, indeed, argued that a distinction is to be drawn in this respect between a Mahomedan and a Hindú woman; nay, that in all that concerns her power over her property, the former is by law more independent than an English woman of her husband. It is no doubt true that a Mussulman woman, when married, retains dominion over her own property, and is free from the control of her husband in its disposition; but the Hindú law is equally indulgent in that respect to the Hindú wife. It may also be granted that in other respects the Mahomedan law is more favourable than the Hindú law to women and their rights, and does not insist so strongly on their necessary dependence upon, and subjection to, the stronger sex. But it would be unsafe to draw from the letter of a law, which, with the religion on which it is chiefly founded, is spread over a large portion of the globe, any inference as to the capacity for business of a woman of a particular race or country. In India the Mussalman woman of rank, like the Hindú, is shut up in the zenanah, and has no communication, except from behind the *pardah* or screen, with any male persons, save a few privileged relatives or dependants. The culture of the one is not, generally speaking, higher than that of the other, and they may be taken to be equally liable to

the pressure and influence which a husband may be presumed to be likely to exercise over a wife living in such a state of seclusion. Their Lordships must, therefore, hold that this lady is entitled to the protection which, according to the authorities, the law gives to a *pardah-nashín*, and that the burden of proving the reality and *bonâ fides* of the purchases pleaded by her husband was properly thrown on him." The case of *Abdúl Alí* alias *Shoageea* v. *Karímanissa*, IX W. R. Civ. Rul. 153, was also a suit by a Mahomedan female against her husband, from whom she had been divorced, to recover property into possession of which the defendant had come by reason of his marriage with the plaintiff, and which he was found not to hold in his own right. The burden of proof was here also laid upon the husband. In the case of *Rúp Narain Singh and others* v. *Gangadhar Persad Narain and others*, IX W. R. Civ. Rul. 297, a Hindú *pardah-nashín* woman, acting as guardian of her minor sons, had sold three estates to the persons who held them under *zúr-i-peshgí* mortgages, and who therefore were liable to account to the minors on behalf of whom their mother was acting. The minors, on coming of age, brought an action to impeach the sales, and it was held to lie upon the purchasers to prove the honesty of the transaction, partly because they had purchased from a *pardah-nashín* female and partly because the purchase was that of the property of a person under a disability (see *ante*, p. 358). In the case of *R. A. Pushong* v. *Múnia Halwaní*, I B. L. R. A. C. 95, the transaction was between persons standing in the relation of legal adviser and client, and related to the subject of litigation or advice. Such a contract, it was observed, is liable to be questioned by the other side at any time, and when it is questioned every presumption is made against its being just. Undue influence is presumed to have been exerted until the contrary is proved; and it is incumbent upon the purchaser, if he relies upon the contract, to show that all its terms and conditions are fair, adequate, and reasonable. Failing that, his claims under the contract and his rights under it must go. See also *Pannalal Seal* v. *Srímatí Bama Sundarí Dasí*, VI B. L. R. 732: and *Grose and another* v. *Amírtamayí Dasí*, IV B. L. R. O. J. 1. In the case of *Ram Persad Misser* v. *Raní Phúlpatí*, VII W. R. Civ. R. 99, the same principle was applied to a deed-of-gift of property, apparently not the property in litigation, and which formed the subject of advice, made by a Hindú *pardah-nashín* woman to a *Mukhtar* employed by her to conduct certain suits.]

Birth during marriage conclusive proof of legitimacy.

112. The fact that any person was born during the continuance of a valid marriage between his mother and any man, or within two hundred and

eighty days after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate son of that man, unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten.

[The legal maxim is, *Pater est quem nuptæ demonstrant*—"He is the father whom the nuptials indicate." See the maxim applied in the case of Mahomedans in *Jeswant Singh Ji Ubby Singh Ji and another* v. *Jet Singh Ji Ubby Singh Ji*, III Moo. Ind. Ap. 150. Unless it be shown that the parties to the marriage had no access, the fact that the woman was living in notorious adultery will not be sufficient to rebut the presumption of legitimacy. Under English law the presumption may be rebutted by proof of the impotency of the husband. The above Section scarcely makes provision for this. When non-access is proved until within six months of the woman's delivery, the husband will be presumed, in accordance with the invariable course of nature, not to be the father of the child.[1] As to "conclusive proof," see Section 4, p. 76, *ante*. It may be assumed that the provisions of this Section will supersede certain rather absurd rules of Mahomedan law, by which a child born six months after marriage or within two years after divorce or the death of the husband, is presumed to be his legitimate offspring. See the Hedaya, Chap. XIII, and Macnaghten's Hindú Law, Chap. VII, § 31.]

Proof of cession of territory.

113. A notification in the *Gazette of India* that any portion of British territory has been ceded to any Native State, Prince or Ruler, shall be conclusive proof that a valid cession of such territory took place at the date mentioned in such notification.

[As to "conclusive proof," see Section 4, page 76, *ante*. See, in connection with this Section, Clause 7, Section 3, Bengal Regulation XIV of 1825, which enacts that, for the purposes of that Regulation (*viz.*, the inquiry into the validity of lakheraj grants), the following shall be held to be the periods at which the several provinces subordinate to the Bengal Presidency were acquired by the British Government, namely, for Bengal, Behar, and Orissa (excepting Cuttack), the 12th August,

[1] 1 Macqueen's Scotch Appeal Cases, House of Lords, 277: *R.* v. *Luffe*, 8 East's Reports, 202.

1865: for Benares, the 1st July, 1775: for the provinces ceded by the Nawab Vizier, the 1st January, 1801: for the provinces ceded by Daulat Rao Scindia and the Peshwah, the 1st January, 1803: for the province of Cuttack, Puttaspore and its dependencies, the 14th October, 1803: for the pergunnah of Khandah, and the other territory ceded by Nana Gobin Rao, the 1st November, 1817.]

Court may presume existence of certain facts.

114. The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business in their relation to the facts of the particular case.

Illustrations.

The Court may presume—

(*a.*) That a man who is in possession of stolen goods soon after the theft is either the thief or has received the goods knowing them to be stolen, unless he can account for his possession;

[The presumption usually made is that of *theft*. In order to warrant the presumption of *receiving*, there should be evidence of some other person having committed the theft, see Roscoe's Criminal Evidence, *sixth ed.*, p. 817, and the observations of *Patteson, J.*, in the case of *R.* v. *Densley* there quoted. What amounts to recent possession sufficient to justify the presumption in any particular case varies according as the stolen article is or is not calculated to pass readily from hand to hand See the cases quoted, Roscoe, pp. 18—20: and Tay., § 122.]

(*b.*) That an accomplice is unworthy of credit, unless he is corroborated in material particulars;

[See Section 133, *post*, and the note thereto.]

(*c.*) That a bill of exchange, accepted or endorsed, was accepted or endorsed for good consideration;

[Bills of exchange and promissory notes form an exception to the general rule that the consideration for a contract must be proved; and are *primâ facie* presumed to be founded on a valuable consideration, partly to secure their negociability, and partly because the existence of a valid consideration may reasonably be inferred from the solemnity of the instruments themselves and the deliberate mode in which they are executed. See Tay., § 127; Story on Bills, §§ 16, 178.]

(*d.*) That a thing or state of things which has been shown to be in existence within a period shorter than that within which such things or state of things usually cease to exist, is still in existence;

(*e.*) That judicial and official acts have been regularly performed;

[*Omnia præsumuntur rite esse acta*—" All things are presumed to have been duly performed." See Tay., §§ 124, 124A, 125, 126: Wharton's Legal Maxims, p. 129: and Broom's Legal Maxims, p. 907.]

(*f.* That the common course of business has been followed in particular cases;

[As for example, the course of business in the Post-office. See Section 16, *ante*, p. 93.]

(*g.*) That evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it;

[See Tay., §§ 101, 499, 729; and the case of *Armory* v. *Delamirie*, 1 Smith's Leading Cases, 301, in which a jewel found by a chimney-sweeper's boy was presumed to be of the best description as against the jeweller who had received it from the boy and refused to return it.]

(*h.*) That if a man refuses to answer a question which he is not compelled to answer by law, the answer, if given, would be unfavourable to him;

[See Section 4 of the Oaths' Act, VI of 1872.]

(*i.*) That when a document creating an obligation is in the hands of the obligor, the obligation has been discharged.

[See Tay., § 146 and cases there quoted: and *Shearmam* v. *Fleming and others*, V B. L. R. 619.]

But the Court shall also have regard to such facts as the following, in considering whether such maxims do or do not apply to the particular case before them:—

As to Illustration (*a*)—A shop-keeper has in his till a marked rupee soon after it was stolen, and cannot account for its possession specifically, but is continually receiving rupees in the course of his business:

As to Illustration (*b*)—A, a person of the highest character, is tried for causing a man's death by an act of negligence in arranging certain machinery. B, a person of

equally good character, who also took part in the arrangement, describes precisely what was done, and admits and explains the common carelessness of A and himself:

As to Illustration (*b*)—A crime is committed by several persons. A, B, and C, three of the criminals, are captured on the spot and kept apart from each other. Each gives an account of the crime implicating D, and the accounts corroborate each other in such a manner as to render previous concert highly improbable:

As to Illustration (*c*)—A, the drawer of a bill of exchange, was a man of business. B, the acceptor, was a young and ignorant person, completely under A's influence:

As to Illustration (*d*)—It is proved that a river ran in a certain course five years ago, but it is known that there have been floods since that time which might change its course:

As to Illustration (*e*)—A judicial act, the regularity of which is in question, was performed under exceptional circumstances:

As to Illustration (*f*)—The question is, whether a letter was received. It is shown to have been posted, but the usual course of the post was interrupted by disturbances:

As to Illustration (*g*)—A man refuses to produce a document which would bear on a contract of small importance on which he is sued, but which might also injure the feelings and reputation of his family:

As to Illustration (*h*)—A man refuses to answer a question which he is not compelled by law to answer, but the answer to it might cause loss to him in matters unconnected with the matter in relation to which it is asked:

As to Illustration (*i*)—A bond is in possession of the obligor, but the circumstances of the case are such that he may have stolen it.

History of Presumptions.

[Presumptions have usually been divided by English text-writers into two classes: *viz.—presumptions of law* and *presumptions of fact.* Presumptions of law consist of rules which in certain cases either prohibit or dispense with any ulterior enquiry. They are founded either upon the first principles of justice, or the laws of nature, or the experienced course of human conduct and affairs, and the connection usually found to exist between certain things. Where the uniform experience of mankind has found this connection to exist, the law recognizes it without further proof. The correctness of the presumption is more or less probable in proportion to the uniformity of the

experience. Presumptions of law have, therefore, been divided into two kinds—*Conclusive* and *disputable* (see *ante*, p. 76). "*Conclusive*, or as they are elsewhere termed, *imperative* or *absolute* presumptions of law," says Mr. Taylor, "are rules determining the quantity of evidence requisite for the support of any particular averment, which is not permitted to be overcome by any proof that the fact is otherwise. They consist chiefly of those cases in which the long-experienced connection, just alluded to, has been found so general and uniform as to render it expedient for the common good that this connection should be taken to be inseparable and universal. They have been adopted by common consent, from motives of public policy, for the sake of greater certainty, and the promotion of peace and quiet in the community; and, therefore, it is that all corroborating evidence is dispensed with, and all opposing evidence is forbidden."[1] As has already been pointed out, these presumptions correspond with "*conclusive proof*," as defined in Section 4, *ante*, p. 76. The Evidence Act creates two such presumptions, namely, as to legitimacy (Section 112), and as to cession of of territory (Section 113); and there are some others to be found in the Indian Statute Book: *e. g.*, a declaration made under Section 6 of the Land Acquisition Act, X of 1870, and published in the *Gazette*, is conclusive evidence that the land which forms the subject thereof is needed for a public purpose or for a company (see Section 6 of the Act)—a statement by a Magistrate to the effect that a proclamation was duly made for a person charged with a warrant offence who has absconded is under Section 171 of the Code of Criminal Procedure conclusive evidence of due compliance with the law—a certificate given to a purchaser at a sale for arrears of land-revenue or of public demands recoverable as land-revenue, is, under Section 8, Act VII (B. C.) of 1868, conclusive evidence that all the necessary notices have been served and posted—the register prepared under Section 26 of the "Chota Nagpore Tenures Act," II (B. C.) of 1869, is conclusive evidence of all matters recorded therein in pursuance of the Act—a notification by the Local Government under Section 5 of "The Criminal Tribes' Act," XXVII of 1871, is conclusive proof (Section 6, *idem*) that the provisions of the Act are applicable to the tribe, gang, or class specified therein.[2] See also (as to the boundary of the Sunderbuns) *Rájá Baradakanth Rai* v. *The Commissioner of the Sunderbuns*, II B.

Conclusive Presumptions of Law.

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[1] § 62.

[2] See also Sections 27, 28, and 29 of the Limitation Act, IX of 1871, which deal with as questions of substantive law certain presumptions (as to easements, &c.) of English text-writers. See *Bhuban Mohan Banerji and others* v. *J. S. Elliott and others*, VI B. L. R. 85.

L. R. P. C. 41. *Disputable*, or, as they have been otherwise termed, *rebuttable* presumptions, are "as well as the former," says Mr. Taylor, "the result of the general experience of a connection between certain facts or things, the one being usually found to be the companion or the effect of the other. The connection, however, in this class is not so intimate or so uniform as to be conclusively presumed to exist in every case; yet it is so general that the law itself, without the aid of a jury, infers the one fact from the proved existence of the other in the absence of all opposing evidence. In this mode the law defines the nature and amount of the evidence, which is sufficient to establish a *primâ facie* case, and to throw the burden of proof upon the other party; and if no opposing evidence is offered, the jury are bound to find in favour of the presumption. A contrary verdict might be set aside as being against evidence. The rules in this class of presumptions, as in the former, have been adopted by common consent, from motives of public policy and for the promotion of the general good;—yet not, as in the former class, forbidding all further evidence, but only dispensing with it till some proof is given on the other side to rebut the presumption raised. Thus, as men do not generally violate the Penal Code, the law presumes every man *innocent;* but some men do transgress it; and therefore evidence is received to repel this presumption."[1] Sections 79, 80, 81, 82, 83, 84, 85, and 89 create presumptions corresponding to those here described, and there are others to be found in the Indian Statute Book. The following are the most important. Ryots, who, in the provinces of Bengal, Behar, Orissa, and Benares, hold lands at fixed rates of rent, which have not been changed from the time of the Permanent Settlement, are entitled to receive *patas* at these rates (Section 3 of Act X of 1859, and Section 3 of Act VIII (B. C.) of 1869); and whenever in any suit under either of these Acts it is proved that the rent at which land is held by any such ryot has not been changed for a period of twenty years before the commencement of the suit, it *shall be presumed* that the land has been held at that rent from the time of the Permanent Settlement, unless the contrary be shown or unless it be proved that such rent was fixed at some later period (Section 4 of Act X of 1859 and Section 4 of Act VIII (B. C.) of 1869). As to the mode of raising the question whether a ryot is entitled to the benefit of this presumption, see *Harak Singh and another* v. *Tulsí Ram Sahú* (Full Bench) V B. L. R. 47. A similar presumption is created by the law in the case of *talukdárs* (Sections 15 and 16 of Act X of 1859, and Sections 16 and 17 of Act VIII (B. C) of 1869). Ryots having rights of occupancy are entitled to receive *patas* at fair and equitable rates, and in case of

Disputable Presumptions of Law.

[1] §§ 95, 96.

dispute the rate previously paid by the ryot is to be presumed to be fair and equitable unless the contrary be shown in a suit by either party (Section 5 of Act X of 1859 and Section 5 of Act VIII (B. C.) of 1869). Under the provisions of Section 11 of the Punjab Laws Act, IV of 1872, the right of pre-emption shall be presumed to exist, whether recorded in the list of customs at Settlement or not, in all *village communities*, however constituted, unless the existence of any custom or contract to the contrary can be proved. It shall be presumed to extend to the village site, to the houses built upon it, to all lands and shares of lands within the village boundary, and to all transferable rights of occupancy affecting such lands. The right of pre-emption shall not, however, be presumed (Section 12, *id.*), but may be shown to exist in any *town* or *city* or any subdivision thereof. Under Section 13 of Act V of 1866, protest of a Bill of Exchange, whether inland or foreign, when purporting to be made by a Notary Public is *primâ facie* evidence that the bill has been dishonoured. Under Section 30 of the Indian Companies' Act, X of 1866, a certificate under the common seal of the Company, specifying any share or shares or stock held by any member of a Company shall be *primâ facie* evidence of the title of the member to the share or shares or stock therein specified. Under Section 36 of the same Act the register of members is *primâ facie* evidence of any matters directed or authorized by the Act to be inserted therein: and under Section 170, when any Company is being wound up, all books, accounts, and documents of the Company and of the liquidator shall, as between the contributories of the Company, be *primâ facie* evidence of the truth of all matters purporting to be therein recorded. The presumption is that a man retains his domicile of origin, and the burden of proving a change lies on the person alleging it (see Section 9 of the Indian Succession Act, X of 1865).

Presumptions of Fact.

"*Presumptions of Fact*," says Mr. Taylor, "usually treated as composing the second general head of presumptive evidence, can hardly be said with propriety to belong to this branch of the law. They are, in truth, but mere arguments, of which the major premiss is not a rule of law; they belong equally to any and every subject-matter, and are to be judged by the common and received tests of the truth of propositions and the validity of arguments. They depend upon their own natural efficacy in generating belief, as derived from those connections, which are shown by experience, irrespective of any legal relations. They differ from presumptions of law in this essential respect, that while *those* are reduced to fixed rules, and constitute a branch of the system of jurisprudence, *these* merely natural presumptions are derived wholly and directly from the circumstances of the particular case by means of the common experience of mankind, without the aid or control

of any rules of law. Such, for example, is the inference of guilt, drawn from the discovery of a broken knife in the pocket of the prisoner, the other part of the blade being found sticking in the window of a house, which by means of such an instrument had been burglariously entered."[1]

Subject of Presumptions how dealt with in Indian Evidence Act.

The view taken of the subject of presumptions, and the mode in which the subject has been dealt with by the framers of the Indian Evidence Act is briefly as follows. It was considered that many topics which, properly speaking, have nothing to do with the law of evidence, have been treated under the head of presumptions by English text-writers.[2] Those which were considered to be of real practical importance have been included in the Sections of the Act already referred to. "They fall under these heads," said Mr. Stephen: "1*st*—There are a few cases in which it is expedient to provide that one fact shall be conclusive proof of another, for various obvious reasons—the inference of legitimacy from marriage is a good instance. 2*ndly*—There are several cases in which Courts would be at a loss as to the course which

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[1] § 169.

[2] "The subject of presumptions," said Mr. Stephen, in moving that the Report of the Select Committee on the Bill be taken into consideration, "is one of some degree of general interest. It was a favourite enterprise on the part of continental lawyers to try to frame systems as to the effect of presumptions which would spare Judges the trouble of judging of facts for themselves by the light of their own experience and common sense. A presumption was an artificial rule as to the value and import of a particular proved fact. These presumptions were almost infinite in number, and were arranged in a variety of ways. There were rebuttable presumptions, and presumptions which were irrebuttable; *Præsumptiones juris et de jure*, *Præsumptiones juris*, and *Præsumptiones facti*. There were also an infinite variety of rules for weighing evidence; so much in the way of presumption and so much evidence was full proof, a little less was half-full, and so on. Scraps of this theory have found their way into English law, where they produce a very incongruous and unfortunate effect, and give rise to a good deal of needless intricacy. Another use to which presumptions have been put is that of engrafting upon the law of evidence many subjects which in noway belong to it. For instance, there is said to be a conclusive presumption that every one knows the law, and this is regarded as necessary in order to vindicate the further proposition that no one is to be punished for breaking a law of which he was ignorant. To my mind this is simply expressing one truth in the shape of two falsehoods. The plain doctrine, that ignorance of the law is no excuse for breaking it, dispenses with the presumption, and hands the subject over, from the Law of Evidence with which it is accidentally connected, to criminal law to which it properly belongs." *Proceedings of the Legislative Council on the 12th March*, 1872, *page* 233 *of the Supplement to the Gazette of India of March 30th*, 1872. Mr. Stephen's views will be found further stated at pages 181—183 of his recently published work, "The Indian Evidence Act, with an Introduction on the principles of Judicial Evidence."

they ought to take under certain circumstances without a distinct rule of guidance. After what length of absence unaccounted for, for instance, may it be presumed that a man is dead? The rule is that seven years is sufficient for the purpose. Obviously, six or eight would do equally well; but it is also obvious that, to have a distinct rule is a great convenience. All cases of this kind fall properly under the head of the Burden of Proof, and I think it will be found that the provisions contained in Chapter VII of the Bill provide for all of them. A new Section (114) has been added to this chapter which deserves special notice. . . . . .

The effect of this provision, coupled with the general repealing clause at the beginning of the Bill, is to make it perfectly clear that Courts of Justice are to use their own common sense and experience in judging of the effect of particular facts, and that they are to be subject to no technical rules whatever on the subject.[1] The illustrations given are, for the most part, cases of what in English law are called presumptions of law; artificial rules as to the effect of evidence by which the Court is bound to guide its decision; subject, however, to certain limitations which it is difficult either to understand or to apply, but which will be swept away by the Section in question. I am not quite sure whether, in strictness of speech, the rule that an accomplice is unworthy of credit, unless he is confirmed, can be called a presumption of law, though, according to a very elaborate judgment of Sir Barnes Peacock's, it has, at all events, some of the most important characteristics of such a presumption. Be this how it may, the indefinite position in which it stands has been the cause of endless perplexity and frequent failures of justice. On the one hand, it is clear law that a conviction is not illegal because it proceeds on the uncorroborated evidence of an accomplice; on the other hand, it seems to be also law that, in cases tried by a jury, the Judge is bound by law to tell them that they ought not to convict on such evidence, though they can if they choose. How a Sessions Judge (sitting without a jury) is to give himself a direction to that effect, and how a High Court is to deal with a case in which he has convicted, although he told himself that he ought not to convict,

[1] In his recently published work Mr. Stephen says, "the terms of this Section are such as to reduce to their proper position of mere maxims, which are to be applied to facts by the Courts in their discretion, a large number of presumptions to which English law gives, to a greater or less extent, an artificial value. Nine of the most important of them are given by way of illustration. All notice of certain general legal principles, which are sometimes called presumptions, but which in reality belong rather to the substantive law than to the law of evidence, was designedly omitted, not because the truth of those principles was denied, but because it was not considered that the Evidence Act was the proper place for them" (p. 133).

I do not quite understand. At all events, it seems to me quite clear that he ought to be at liberty to use his discretion on the subject. Of course, the fact that a man is an accomplice forms a strong objection, in most cases, to his evidence; but every one, I think, must have met with instances in which it is practically impossible to doubt the truth of such evidence, although it may not be corroborated, or although the evidence by which it is corroborated is itself suspicious."[1]

Artificial and technical rules thus finding no place in the new law, and the Courts being as free in this respect as they were before the Act was passed, to use their own common sense and experience in judging of the effect of particular facts, it will be useful to notice certain fixed principles in the nature of presumptions, which have usually guided the highest Courts in dealing with certain questions peculiar to India. The presumption of the Hindú law, in a joint undivided family, is that the whole property of the family is joint estate, and, as already pointed out, *ante*, page 357, the burden of proving any part of such property to be his separate or self-acquired property is upon the person asserting it to be such (*Gopí Kristo Gosain* v. *Ganga Persad Gosain*, VI Moo. Ind. Ap. 53: *Dharm Dass Pandey and others* v. *Massamat Shama Sundari Debí*, III Moo. Ind. Ap. 229: *Pran Krishna Paul Chaudhrí* v. *Mathúra Mohan Paul Chaudhrí*, X Moo. Ind. Ap. 403: *Nawab Abed Alí Mírza* v. *Maharájá Moheshur Baksh Singh*, Sev. Aug.—Dec., 1863, p. 801: *Tara Charan Mukherji* v. *Jai Narain Mukherji*, VIII W. R. Civ. Rul. 226 (Presumption extended to property acquired during the admitted continuance of the joint estate): and see *Shiu Golam Singh* v. *Baran Singh*, I B. L. R. A. C. 164: *Lalla Srídhar Narain* v. *Lalla Madho Persad and others*, VIII W. R. Civ. Rul. 294 (Nature of evidence given by an auction-purchaser of the rights of one member of the family to rebut this presumption). This presumption will not be sufficiently rebutted by evidence that the name of one member of the family only appeared as that of sole owner in revenue records or in other documents relating to the property (*Mussamat Jasúndah* v. *Ajodhia Persad and others* (before the Privy Council on the 17th July, 1867), II Jur. N. S. 261: *Janokí Dasí and others* v. *Krishto Kumal Singh and others*, Marsh Rep. 1)—nor by evidence of separation in mess merely[2] (*Bani Madhub Mukherji* v. *Bhagobatí Charan Bunerji and others*, VIII W. R. Civ. Rul. 270)—nor, in the case of further acquirements, by mere evidence that the consideration-money

Principles in the nature of presumptions peculiar to India.

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[1] *Proceedings of the Legislative Council, pages* 234—235 *of the Supplement to the Gazette of India of* 30*th March*, 1872.

[2] Separation in both dwelling and food may, however, be sufficient to raise the presumption of separation in estate (*Jagan Koer and others* v. *Raghú Nandan Lal Sahú and another*, X W. R. Civ. Rul. 148.

passed out of the hands of the member claiming the purchased property as self-acquired without its being shown that the funds were exclusively his own (*Kunj Beharí Dutt and another* v. *Khetarnath Dutt and others*, VIII W. R. Civ. Rul. 270). Nor will evidence that several parcels are held in severalty rebut the presumption in respect of the rest of the estate (*Sríram Ghose and others* v. *Srínauth Dutt Chaudhrí and others*, VII W. R. Civ. Rul. 451). In order to raise the presumption that the property is joint, it must be either admitted or proved that the family is a joint undivided family (*Shiu Golam Singh* v. *Baran Singh*, I B. L. R. A. C. 164): and as separation in mess is not sufficient to rebut, so the mere fact of the family living in commensality will be insufficient to raise this presumption (*Radhika Persad Dey* v. *Massamat Dharma Dasí Debí and others*, III B. L. R. A. C. 124). Where an ancient family custom is proved to have existed among Hindús, the presumption is in favour of the continuance of that custom even though the family have migrated (*Sarendranath Rai* v. *Hiramaní Barmaní*, I B. L. R. P. C. 26). In the case of a family who had emigrated from a part of the country governed by the Mitakshara law, it was presumed that they continued to be governed by that law until it was shown that they had adopted the law of their new domicile in Bengal (*Pírthi Síngh* v. *Mussamat Sheo Sundarí*, VIII W. R. Civ. Rul. 261). This presumption has been held to be sufficiently rebutted by evidence showing that, except as regards marriage all other ceremonies in the family are performed according to the law of the Bengal school and by Bengal priests (*Ram Bromo Pandah* v. *Kaminí Sundarí Dasi and others*, VI W. R. Civ. Rul. 295). In the case of alienation by a Hindú widow of property to which she succeeded as heiress of her husband, there is no *primâ facie* presumption either in favour of, or against, the propriety of the alienation (*Golukmaní Debí* v. *Digambar Dey*, II Boul. Rep. 193: but see *Ráj Lakhí Debí* v. *Gokal Chandra Chaudhrí*, III B. L. R. P. C. 57). The habit of holding land *benami* is inveterate in India; but that does not justify the Courts in making every presumption against apparent ownership (*Munshí Bazlúr Rahím* v. *Shamsúnissa Begum*, XI Moo. Ind. Ap. 602: *Sríman Chandra Dey* v. *Gopal Chandra Chakravartti and others*, XI Moo. Ind. Ap. 28: and see *Mohesh Chandra Bandapadhya* v. *Srímatí Barada Debí*, II B. L. R. A. C. 275). Under English law, when real estate is purchased by a father *in the name of* his son, a presumption arises that the purchase was intended for the son's advancement,[1] and the son will take the property so purchased. But no such presumption arises under Hindú law: and when

Benami.

[1] The doctrine of *advancement* will be found fully treated in *Dyer* v. *Dye* *I Leading Cases in Equity*, 184, and in *Story's Equity Jurisprudence*, §§ 1202—120

immovable property is purchased by a Hindú in the name of his son, the presumption is that it is a *benamí* purchase merely, and that the property belongs to the father. If the person in whose name it was purchased allege that he is solely entitled to the legal and beneficial interest in such property, the burden of proving this will lie upon him (*Gopi Kristo Gosain* v. *Ganga Persad Gosain*, VI Moo. Ind. Ap. 53). The same principle applies in the case of Mahomedans and of a purchase made by a Mahomedan father in the name of his son (*Mulví Syud Azhar Alí* v. *Massamat Bibí Altaf Fatima*, XIII Moo. Ind. Ap. 232), or in the name of his wife (*Rani Súrnamayi* v. *Lachmípat Dúgar and others* (Full Bench), IX W. R. Civ. Rul. 338). The presumption that the purchase was an ordinary *benamí* one may be rebutted by evidence showing that the father's object was to affect the ordinary rule of succession as from him to the property purchased (*Rakna Daula Nawab Ahmed Alí Khan* v. *Hardwarí Mull* (Privy Council), V B. L. R. 578). It was also here laid down, that when *bonâ fide* creditors seek to render liable property of which their debtor is the ostensible owner, it is the duty of a Court of Justice to put those who object on the ground that he only held *benamí* to strict proof of such objection. It may be observed that the usual mode of proving a purchase to be a *benamí* one is to show that the funds with which the purchase was made were exclusively the funds of the person alleged to be the real owner of the property (*Gopi Krishto Gosain* v. *Ganga Persad Gosain*, VI Moo. Ind. Ap. 53: *Mulví Syud Azhar Alí* v. *Massamat Bibí Altafí Fatima*, XIII Moo. Ind. Ap. 232).

Doctrine of Satisfaction.

According to English law, as administered in Courts of Equity, if one, being indebted to another in a sum of money, does by his will give him a sum of money as great as or greater than the debt without taking any notice at all of the debt, this shall nevertheless be in satisfaction of the debt, so that he shall not have both the debt and the legacy—*Debitor non presumitur donare*. This presumption has been followed in India, and when a Mahomedan husband, who had agreed to give his wife a dower of five lakhs of Lucknow rupees, subsequently directed four and a half lakhs sicca rupees of Company's paper to be set aside for her, this was presumed to be in satisfaction of dower and not a gift,[1] (*Iftikarunnissa Begam* v. *Nawab Amjad Ali Khan and others* (Privy Council), VII B. L. R. 643). The Indian Succession Act does not follow the doctrine of satisfaction as understood and administered by Courts of Equity in England. When a debtor bequeaths a legacy to his creditor, and it does not appear from the

[1] The doctrine of *satisfaction* will be found fully treated in *ex parte Pye*, *II Leading Cases in Equity*, 331.

will that the legacy is meant as a satisfaction of the debt, the creditor is entitled both to the legacy and to the amount of the debt (Section 164, Act X of 1865). When a parent, who is under obligation by contract to provide a portion for a child, fails to do so, and afterwards bequeaths a legacy to the child, and does not intimate by his will that the legacy is meant as a satisfaction of the portion, the child shall be entitled to receive the legacy as well as the portion (Section 165, *idem*). No bequest shall be wholly or partially adeemed by a subsequent provision made by settlement or otherwise for the legatee (Section 166, *idem*). As to the presumption of English law that a gift made under certain circumstances is a *donatio mortis causâ* being inapplicable to *Hindús*, see *Kumara Upendra Krishna Deb Bahadúr* v. *Nobin Krishna Bose*, III B. L. R. O. C. 121.

Presumptions as to Land.

The hereditary nature of a tenure or *talúk* may be presumed from evidence of long and uninterrupted enjoyment and of the descent of the tenure from father to son, notwithstanding the absence of "words of inheritance" in the instrument by which the tenure was originally created (*Babú Gopal Lal Takúr* v. *Teluk Chandra Rai*, X Moo. Ind. Ap. 191: *Babú Dhanpat Singh* v. *Guman Singh*, XI Moo. Ind. Ap. 465: *Rájá Sattasarran Ghosal* v. *Mohesh Chandra Mitra*, XII Moo. Ind. Ap. 268: *Karunakar Mahati* v. *Niladhro Chaudhrí*, V B. L. R. 655: *Massamat Lakhú Kowar* v. *Rai Harí Krishna Singh*, III B. L. R. A. C. 227 (the words "*mokurrarí istemrarí*" create an hereditary right in perpetuity): *Brajanath Kundú Chaudhrí and others* v. *Lakhí Narain Addí*, VII B. L. R. 211 (*Maurasí* or inheritable title presumed from continuous payment of rent for more than a hundred years). The general presumption is in favour of the liability of land to assessment, and the claimant of *lakheraj* must establish his claim not by inferences and presumptions, but by the positive proof required by the Regulations (*Maharájá Dheraj Rájá Mahatab Chand Bahadúr* v. *The Bengal Government*, IV Moo. Ind. Ap. 497: but see *ante*, page 361). A *zemindar* has as such a *primâ facie* title to the gross collections of all the *mouzas* or villages within his *zemindárí*, and the burden of proof is upon those who seek to defeat that right by proving the grant of an intermediate tenure (*Rájá Sahib Prahlad Sen* v. *Durga Persad Tewarí*, XII Moo. Ind. Ap. 331: and II B. L. R. P. C. 134). A suit to enhance rent proceeds on the presumption that a zemindar holding under the *perpetual settlement* has the right, from time to time, to raise the rents of all the rent-paying lands within his *zemindárí*, according to the *pergunnah* or current rates unless either he is precluded from the exercise of that right by a contract binding him, or the lands in question can be brought within one of the exemptions recognized by Bengal Regulation VIII of 1793; and it

also assumes that the defendant has some valid tenure or right of occupancy in the lands which are the subject of the suit. The effect of this presumption, before the passing of Act X of 1859 (which has considerably altered the question) was to relieve the plaintiff zemindar in a suit for enhancement from much of the burden of proof which would have lain on him in an ordinary suit (*Bama Sundarí Dasí* v. *Radhika Chaudhrain*, XIII Moo. Ind. Ap. 262). Title is to be presumed from lawful possession, until the want of title or a better title be proved (*Rájá Haiman Chull Singh* v. *Kumar Gunsheam Singh*, Suth. Priv. Coun. Ap. 4: *Rájá Pedda Vencatapa Naidú Bahadúr* v. *Arúvala Rudrapa Naidú and another*, *idem*, 112: *Baradakant Rai* v *Chandra Kumar Rai and others*, XII Moo. Ind. Ap. 225: and II B. L. R. P. C. 1 (*Bíl* or marsh situate between two *zemindáris*, the proprietor of which owned the fisheries in the *bíl*, and continued to own them after the sale of one of the *zemindáris*, the purchaser of which claimed certain land reclaimed from the *bíl;* but it was held to belong to the former proprietor who had continued in possession of the fisheries): *Trilochan Ghose and others* v. *Kailass Nath Sidhanto Bhaumik Bhattacharjya*, III B. L. R. A C. 298: *Selam Sheikh* v. *Beidonath Ghatak*, III B. L. R. A. C. 312: *Kalí Chandra Sen and others* v. *Adú Sheikh and others*, IX W. R. Civ. Rul. 602: *Amír-u-nissa Begam* v. *Umar Khan*, VIII B. L. R. 541 (Adverse possession, which bars the remedy, extinguishes the right): *Khájá Asanúla* v. *Obheí Chandra Raí*, XIII Moo. Ind. Ap. 318 (Continued possession of a tenure, which could have been avoided by the purchaser at a sale for arrears of Government revenue): and see Section 110 of the Evidence Act, *ante*, page 377). Section 29 of the new Limitation Act, IX of 1871, turns this presumption into a provision of substantive law. When a tenant under a lease having a term holds over after the expiry of the term, he is presumed to hold subject to all the conditions of the lease which are applicable to his new position. When payment of the rent of a particular year is admitted or proved, there is a presumption that the rent of previous years has been paid, unless the contrary be shown (*Raní Súrath Súndarí Debí* v. *K. Brodie*, I W. R. Civ. Rul. 274: *Rájá Enayat Hosen* v. *Sheikh Didar Baksh*, W. R. Jan. —July, 1864, Act X Rul. 97: *Takúr Mitterjít Singh* v. *Choker Narain Singh*, II W. R. Civ. Rul 58). When mortgagees in possession refuse to produce their accounts, in accordance with a principle already alluded to (*ante*, page 387) every reasonable presumption may be made against them and in favour of the mortgagors as to the amount realized from the property. But even such a presumption *in odium spoliatoris* must have reasonable limits (see an example of such reasonable limits in *Shah Makhan Lal* v. *Srí Krishna Singh*, II B. L. R. P. C. 58, and XII Moo. Ind. Ap 198). In connection with the presumption proper to be made from the fact of evidence being withheld or not being forthcoming,

the following observations of their Lordships of the Privy Council in the case of *Bama Sundari Dasi* v. *Radhika Chaudhrain*, XIII Moo. Ind. Ap 269, may also be quoted—"Their Lordships have further to observe that, if the respondent's case were a true one, she would have had little difficulty in proving it. She does not come into Court as the purchaser at a sale for arrears of revenue, who rests upon a statutory title with no documents to support it. She derives title from the *zemindar* with whom the Decennial Settlement was effected; and she has presumably a right of access to all the records of the *zemindári*. Her determination in such circumstances to rest upon the supposed defects in the appellant's proof, and to abstain from giving evidence of the truth of her own case, affords strong grounds for supposing that she had, in fact, no such evidence to give. If such evidence were forthcoming, and she has neglected to give it, she must take the consequences of her own miscarriage."

Presumption as to Legitimacy among Mahomedans.

Mahomedan law raises a strong presumption in favour of legitimacy. Where a child has been born to a father, of a mother where there has not been a mere casual concubinage but a more permanent connection, and where there is no insurmountable obstacle to such a marriage, then, according to the Mahomedan law, the presumption is in favour of such a marriage having taken place (*Khájá Hidayatúla* v. *Rai Jan Khanum*, III Moo. Ind. Ap. 295). This case was referred to in *Ashrafúd Daula Ahmed Hosein Khan Bahadúr and another* v. *Heider Hosein Khan*, XI Moo. Ind. Ap. 94, as deciding that not cohabitation simply and birth, but that cohabitation and birth with treatment tantamount to acknowledgment suffice to prove legitimacy; and it was pointed out that mere continued cohabitation alone will not suffice to raise such a legal presumption of marriage as to legitimatize the offspring, unless it be accompanied with acknowledgment, or conduct equivalent to acknowledgment. "The binding decisions on this subject," it was said, "must be looked for in the judgments of the Privy Council. No decision can be found there which supports so broad an assumption," as that, "mere continued cohabitation alone suffices to raise such a legal presumption of marriage as to legitimatize the offspring." "The presumption of legitimacy from marriage *follows the bed*, and whilst the marriage lasts, the child of the woman is taken to be the husband's child; but this presumption follows the bed and is not antedated by relation An ante-nuptial child is illegitimate. A child born out of wedlock is illegitimate; if acknowledged, he acquires the status of legitimacy. When, therefore, a child really illegitimate by birth becomes legitimated, it is by force of an acknowledgment express or implied, directly proved or presumed. These presumptions are inferences of fact. They are built on the

foundations of the law, and do not widen the grounds of legitimacy by confounding concubinage and marriage. The child of marriage is legitimate as soon as born. The child of a concubine may become legitimate by treatment as legitimate. Such treatment would furnish evidence of acknowledgment. A Court would not be justified, though dealing with this subject of legitimacy, in making any presumptions of fact which a rational view of the principles of evidence would exclude. The presumption in favour of marriage and legitimacy must rest on sufficient grounds, and cannot be permitted to override overbalancing proof, whether direct or presumptive."—In the case of *Mahomed Bakhir Hosein Khan* v. *Sharfanissa Begam*, VIII Moo. Ind. Ap. 159, the same principles were applied, and it was held that under the circumstances of the particular case the presumption of legitimacy was not justified. But while arriving at this conclusion in that particular case their Lordships guarded their judgment by saying that they wished to be distinctly understood as not denying or questioning the position that, according to Mahomedan law, the legitimacy or legitimation of a child of Mahomedan parents may properly be presumed or inferred from circumstances without proof, or at least without any direct proof, either of a marriage between the parents or of any formal act of legitimation.

Some other cases.

It is a maxim of Hindú law in cases of adoption that 'permission is to be presumed in the absence of prohibition;' but this maxim relates to the person who gives, not to the person who receives, a child in adoption (*Tarini Charan Chaudhri* v. *Saroda Sundari Dasi* and *Anand Chandra Chaudhri and another* v. *Saroda Sundari Dasi*, III B. L. R. A. C. 145). There is a presumption in Calcutta that where a vendor of goods deals with a *banian* of an European firm, *quâ* banian, the principal does not incur any liability whatever, and the vendor so dealing can look to the banian only for the price (*Sheikh Faizúla* v. *Ram Kamal Mitter*, II B. L. R. O. C. 7). Where bills are produced by the acceptor after due date and the drawer has received no notice of dishonor and no demand for the payment of such bills, the presumption is that they have been paid by the acceptor (*Shearman* v. *Fleming and others*, V B. L. R. 619). An indefinite or general hiring in India does not mean a hiring for a year certain as it does in England, nor is the mere payment of wages monthly enough to show that a hiring is a monthly hiring (*P. F. Hughes* v. *The Secretary of State for India in Council*, VII B. L. R. 689). The return to a writ of *habeas corpus* is not necessarily conclusive and does not preclude enquiry into the truth of the matters alleged therein, although the 56 Geo. III, Cap. 100, which allows affidavits to be used to contradict the return in criminal matters does not extend to India (*In the matter of Khatija Bibi*, V B. L. R. 557: *sed—contra: The Queen* v. *Vaughan and another*, V B.

L. R. 418). It may be observed that the writ of *habeas corpus* cannot now be issued by the High Courts beyond the Presidency towns (see Section 82 of the Code of Criminal Procedure, Act X of 1872).]

CHAPTER VIII.—ESTOPPEL.

Estoppel.

115. When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed in any suit or proceeding between himself and such person or his representative to deny the truth of that thing.

Illustration.

A intentionally and falsely leads B to believe that certain land belongs to A, and thereby induces B to buy and pay for it.

The land afterwards becomes the property of A, and A seeks to set aside the sale on the ground that, at the time of the sale, he had no title. He must not be allowed to prove his want of title.

["An estoppel," says Lord Coke, "is where a man is concluded by his own act or acceptance to say the truth." Mr. Smith in his note to the Duchess of Kingston's case characterizes this definition as *a little startling*, but it nevertheless gives a good idea of what it is by no means easy to include within the limits of a definition. An estoppel may, perhaps, in other language be said to be a personal disqualification to gainsay a certain fact, imposed on an individual for reasons of public policy and extending not only to the individual himself but to his privies or representatives in interest. Lord Coke divided estoppels into three kinds, and this division has been usually followed by those who have since treated the subject—*viz.:* 1st, by matter of record; 2nd, by deed; 3rd, *in pais*. Estoppel by matter of record is concerned with the admissibility and effect of judgments. This portion of the subject has been already disposed of (Sections 40—44, *ante*, pages 171—239). The authors of the Evidence Act have not regarded it as a branch of the subject of *estoppels*. With respect to *estoppels by deed*, Indian law does not recognize out of the Presi-

Meaning of estoppel.

Division of estoppels.

dency towns the division of contracts into those not under seal called *simple contracts* and those under seal called *deeds* or *specialities*: and even in the Presidency towns the destinction is not recognized where a Hindú or Mahomedan is the defendant (*Ram Gopal Law* v. *Richard Blaquiere*, I B. L. R. O. C. 37). The priciple that a man cannot be allowed to dispute the contents of a *deed*, a solemn instrument to which he has set his hand and seal, has therefore but little application in India, such application being limited to a portion of the community in the Presidency towns (*Zemindár Srí Motí Gaurevallaba Ram Chandra* v. *Verappa Chetí*, II Mad. Rep. 124). We have already seen (*ante*, p. 355 and *Proviso* 1, Section 92, *ante*, p. 316) that the obligor of a bond is not estopped by a recital therein contained to the effect that the consideration has passed from showing that in fact no consideration was given. The instances given by Lord Coke of *estoppels in pais* are:—by matter *in pais*,[1] as by liverie, by entry, by acceptance of rent, by partition, and by acceptance of an estate. The inclination of the Courts has been to extend the principle of *estoppel in pais*, more especially in mercantile transactions, in which men must of necessity trust much to appearances and to the representations of others. The result of the more modern cases was thus expressed by Lord Denman *in Pickard* v. *Sears*:[2]—"The rule of law is clear, that where one, by his words or conduct, wilfully causes another to believe in the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time." In *Freeman* v. *Cook*,[3] Baron Park stated that the rule laid down in *Pickard* v. *Sears* "was to be considered as established; but that by the term 'wilfully' in that rule must be undersood, if not that the party represents that to be the truth which he knows to be untrue, at least, that he means his representation to be acted upon, and that it is acted upon accordingly; and if, whatever a man's real meaning may be, he so conducts himself that a reasonable man would take the representation to be true, and believe that it was meant that he should act upon it, and did act upon it as true, the party making the representation would be equally precluded from contesting its truth: and conduct by negligence or omission, when there is a duty cast upon a person by usage of trade or otherwise to disclose the truth may often have the same effect; as for instance, a retiring partner omitting to inform his customers of the

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[1] *In pais* means "in the country," "before the public." Trial *in pais* is trial *by the country*, *i. e.* by a jury. Conveyances *in pais* are ordinary conveyances between two or more persons *in the country*, *i. e.* upon the land to be transferred.

[2] 6 Adolphus and Ellis's Reports, 475.

[3] 2 Welsby, Hurlsetone, and Gordon's Reports, 654.

firm in the usual mode, that the continuing partners were no longer authorized to act as his agents, is bound by all contracts made by them with third persons, on the faith of their being authorized."[1] "If a man," writes Mr. Justice Story, "having a title to an estate, which is offered for sale, and, knowing his title, stands by and encourages the sale or does not forbid it, and thereby another person is induced to purchase the estate, under the supposition that the title is good, the former so standing by and being silent will be bound by the sale, and neither he nor his privies will be at liberty to dispute the validity of the purchase. So, if a man should stand by, and see another person as grantor execute a deed-of-conveyance of land belonging to himself, and knowing the facts should sign his name as a witness, he would in equity be bound by the conveyance. So, if a party having a title to an estate should stand by, and allow an innocent purchaser to expend money upon the estate, without giving him notice, he would not be permitted by a Court of Equity to assert that title against such purchaser, at least, not without fully indemnifying him for all his expenditures. The same rule has been applied both at law and in equity, where the owner of chattels, with a full knowledge of his own title, has permitted another person to deal with these chattels as his own, in his transactions with third persons, who have bargained and acted in the confidence that the chattels were the property of the person with whom they dealt: for in cases where one of two innocent persons must suffer a loss, *a fortiori* in cases where one has misled the other, he, who is the cause or occasion of that confidence by which the loss has been caused or occasioned, ought to bear it." (§ 385.)

Principle of estoppel long acted upon in India.

It is with estoppels of this third class that Chapter VIII of the Indian Evidence Act is concerned; and the principle involved is one which has long been recognized and acted upon by the Courts in India. The following cases will at once show this and supply useful illustrations of the principle directly applicable to the country. When the real owner of immovable property allowed another person (the *benami* purchaser) to hold himself out to the world as the actual proprietor and so to induce parties ignorant of the real state of things to lend money on the security of the property, he was held not to be entitled to any consideration from the Court, and was not permitted, on showing the actual state of the case, to recover the sale-proceeds of the property (when sold for arrears of revenue), which, in execution

[1] The English cases will be found collected in Mr. Smith's note to the Duchess of Kingston's case (second volume of Leading Cases); and in Mr. Taylor's Work on Evidence, § 769 and following paras. They have been referred to above only so far as was sufficient to illustrate and explain the principle discussed.

of a decree against the *benami* holder, the creditor had taken out of the Collector's Treasury (*Nunda Lal* v. *W. Tayler and others*, I Jur. N. S. 55: *Bama Súndarí Debya* v. *Rashmaní Debya*, IV W. R. Civ. Rul. 36). Certain landed property was attached in execution as belonging to A, upon which B, his mother, and C, his brother's widow, came forward and claimed the property as their own, in consequence of which it was released from attachment. B and C were afterwards allowed to hold themselves out to the world as the real owners of the property, and they disposed of it by sale and otherwise, without objection from A, to persons who transferred to D. After A's death, his widow sold a portion of the property to E. In a suit by D for confirmation of his possession, it was held that D, as a vendee for valuable consideration deriving title from the ostensible owners of the property, was entitled to protection from the subsequent acts of the real owner and his heirs, both of whom were found to be parties to the fraud (*L. Rennie* v. *Gunga Narain Chaudhrí*, III W. R. Civ. Rul. 10). A was the real owner of certain property, but suffered B to hold *benamí* and to appear to the world as the real owner. B stood by while C acting as owner made a mortgage of the property. B also became a witness to the mortgage-deed. A afterwards sued to recover the property, alleging that B had perpetrated a fraud on him. He was held bound by B's conduct, as his own acts had led to the fraud, inasmuch as he had allowed B to be the ostensible owner (*Brojonath Ghose* v. *Kailass Chandra Banerjí*, IX W. R. Civ. Rul. 593). Where property has been transferred or otherwise disposed of *benamí* in fraud of creditors, the real owner or his representatives, private purchasers as well as heirs, will not be permitted to come into Court alleging the fraud and succeed in having the transfer or other disposition of the property set aside (*Lakhí Narain Chackravartti* v. *Taramaní Dasí and others*, III W. R. Civ. Rul. 92 (Suit to set aside a *Mokurrerí* lease created *benamí* in fraud of creditors): *Parikhít Sahú* v. *Radha Kissen Sahú and others*, III W. R. Civ. Rul. 221 (*Benamí* conveyance with same object): *Bhawani Persad and others* v. *Ahidan and another*, V W. R. Civ. Rul. 177 (*Benami* transfer to wife): *Raushan Bibí* v. *Sheikh Karím Baksh and others*, IV W. R. Civ. Rul. 12 (Suit by heirs to obtain property transferred to wife for fraudulent purpose): *Rattan Dayi* v. *Rai Gauri Sunkar*, IV W. R. Civ. Rul. 72: *Bhagwan Das* v. *Apúch Singh and others*, X W. R. Civ. Rul. 185 (Real owner placing *indicia* of ownership in the hands of another, bound by alienation made by the latter, unless he can show that alienation was made without his acquiescence and that alienee took with notice of such fact): *Buni Persad and others* v. *Maun Singh*, VIII W. R. Civ. Rul. 67: *Hari Sankar Múkhapadya* v. *Kalí Kúmar Mukhapadya and others*, Legal Remembrancer, July, 1864, p. 43: *Mohant*

Benamí Transactions.

Raghúbar Dyal Purí v. *Maharájá Kunwar Babú Mohendro Kishore Singh Bahadúr*, *idem*, p. 78. In *Ram Persad and others* v. *Shiva Persad and others*, I N.-W.-P. Rep. 71, fictitious sales of certain property had been executed in favour of persons residing in foreign territory in order to evade process for the recovery of arrears of revenue. The Revenue authorities assumed the management of the property, farmed it, paid off all arrears, and restored possession to the real owners. In a suit by the vendee under the fictitious sale to recover possession it was held that the maxim '*In pari delicto potior est conditio possidentis et defendentis*' applied, although the real owner after passing the property by a fictitious sale could not come into Court to recover it: and that the case was also within the rule that relief will be granted where public policy will be promoted, the public policy here being the policy which Government through the Revenue authorities had decided to be best for the estate. Where land or other immovable property has been sold in execution of a decree (see Section 260 of Act VIII of 1859) or for arrears of Government revenue (see Section 36 of Act XI of 1859), the law will not allow a stranger to claim the property on the ground that the certified purchaser merely purchased *benamí* on his account; and any suit brought on such an allegation must be dismissed with costs.

Other cases.

A having fabricated a deed-of-sale to himself of certain property of his brothers, was thereby enabled to appear as owner of the property and deceive B, to whom he conveyed it for full consideration. The deed-of-sale to A was set aside as fraudulent. A on the death of his brother succeeded to his rights by inheritance. A's heir subsequently sued to recover the property conveyed to B: but it was held that A's heir could not do what A himself would not be allowed to do; that A claiming as heir to his brother could not set up his own fraud and forgery against B whom he had deceived thereby; and that the case came within the well-known rule of law that where a person, by his own solemn and deliberate act, wilfully induces another to believe the existence of a certain state of things, and to deal with him on the faith of it, he is conclusively bound by the representation so made and will never be allowed to contradict it to the prejudice of the other" (*Múnshí Syud Amír Alí* v. *Syef Alí*, V W. R. Civ. Rul. 289: see also *Babú Radhakissen* v. *Mussamat Sharífannissa*, W. R., Jan.—July, 1864, Civ. Rul. 11). A, in execution of a money-decree, brought to sale the right, title, and interest of B in certain property; but he gave no notice that this property had been mortgaged to him and that his mortgage-lien was in existence at the time of the sale. C became the purchaser. A afterwards obtained a decree on the mortgage-bond and assigned this decree, in execution of which the assignee attached the same property. C, having claimed without success

under Section 246 of Act VIII of 1859, brought a regular suit to establish his absolute title. It was held that as A had suppressed the fact of his charge on the property and so had induced C to purchase, he was precluded from afterwards setting up the mortgage-lien, and that A's assignee could not do what A himself would not be allowed to do (*Dallab Sarcar and another* v. *Krishna Kumar Bakshí*, III B. L. R. A. C. 407). A purchased certain property at a sheriff's sale and again conveyed to B. Neither A nor B made any attempt for eleven years to assert their right to the property, or gave any intimation of their purchase to C, who was in possession. C sold to D without any remonstrance from them either before or after the sale. In a suit by the assignee of B to obtain posssession of the property, it was held that A and B, having allowed C to retain all the *indicia* of ownership, having wilfully and designedly kept him in ignorance of their rights, and having looked on in silence while he was innocently selling to a purchaser for valuable consideration, were estopped by this conduct from asserting their rights against that purchaser, and that their assignee was in the same position as they were (*Mohesh Chandra Chatterji* v. *Issur Chandra Chatterji*, I Jur. N. S. 266). A's wife, by a *kabala* sold a portion of certain property to B, and agreed if she sold the rest to sell it to B. A consented to and was a witness of the *kabala*. After the death of his wife, A sold the rest of the property to another person. In a suit by B to set aside this sale and enforce his right of pre-emption, it was held that A was bound by the agreement contained in the *kabala* (*Kalinath Rai* v. *Bhúbanesúrí Dasí*, Sev. Rep July—Dec., 1864, p. 207). An offer of sale was made to a person having a right of pre-emption, but he refused it and consented to a sale to a stranger. It was held that he could not afterwards set up his right of pre-emption (*Braja Kishore Surma* v. *Kirtí Chandra Surma*, VII B. L R. 19). Where a defendant made no objection at the time to the purchaser of the plaintiff's interest in the suit substituting his name on the record for that of the plaintiff, he was not afterwards allowed to contend that the suit had thereby abated (*Bír Chandra Rai Mahapatar* v. *Bansí Dhar Rai Mahapatar and others*, III B. L. R. A. C. 214). A Hindú mother sold a portion of the property during the minority of her son. Eleven months after attaining his majority, this son signed on behalf of his mother a written defence in a suit brought by the purchaser to obtain possession of the property and in which she was a defendant *pro formâ*; and he took an active share in conducting her defence. It was held that he was estopped by this conduct, when he subsequently sued to set aside the sale as made without necessity therefor (*Kebal Krishto Dass* v. *Ram Kúmar Saha*, IX W. R. Civ. Rul. 571). If a man grant a lease of land in which he has no legal interest, he cannot afterwards deny the validity of this lease if he come to have an interest in the

land, and the lease will take effect accordingly. If the lessor, at the time of making the lease, have an interest, it is a rule of English Common Law that such interest only will pass, and the lease will have no further effect by way of estoppel, though the interest purported to be granted be really greater than the lessor had at the time power to grant. Equity would, however, more especially if the lease were made for a valuable consideration, oblige the lessor to make good the term out of the interest he had acquired.[1] Where a person having a limited interest, namely, a sublease, granted a perpetual lease on consideration of Rs. 2,000, and afterwards acquired the proprietary right, he was held to be estopped from disputing the perpetual lease (*Karan Chaubé* v. *Janki Persad*, I N-W-P. Rep. 165). Where a person having a mortgage of certain property, assisted the owner thereof in borrowing money on the security of the same property, as if it were unincumbered: and, neither during the negociation nor at the time of paying over the money so borrowed, communicated the fact of his own lien, it was held that by such conduct he lost the priority which his mortgage otherwise would have had, and that his claims must be postponed to those of the subsequent mortgagee[2] (*Rai Sita Ram* v. *Kissen Das* alias *Kishnarain*, V N-W-P. Rep. 402). A person cannot use as an estoppel a statement by which he has been in noway misled or induced to alter his position to his own detriment (*Girish Chandra Ghose* v. *Iswar Chundra Mukherji and others*, III B. L. R. A. C. 337; *Karáli Charan Banerji* v. *Maharájá Dheráj Mahtab Chandra Bahadúr*, Sev. Rep. July—Dec., 1864, p. 29). Under the provisions of Section 237 of the Indian Contract Act, IX of 1872, when an agent has without authority done acts or incurred obligations to third persons on behalf of his principal, the latter is bound, if he has by his words or his conduct induced such third persons to believe that such acts and obligations were within the scope of the agent's authority (see also Section 238). Section 245 of the same Act enacts that a person who has, by words spoken or written, or by his conduct, led another to believe that he is a partner in a particular firm, is responsible to him as a partner in such firm. Section 246 further provides that any one consenting to allow himself to be represented as a partner, is liable as such to third persons who on the faith thereof give credit to the partnership. See also Section 164, *post*.

Some provisions of the Indian Contract Act.

In the following cases there was held to be no estoppel. A Hindú widow, who had inherited as heiress of her husband, sold a portion of the property by an instrument which recited that the sale was

Cases in which no estoppel.

[1] See *Williams on the Law of Real Property*, 6th ed., p. 358; and *Story's Equity Jurisprudence*, § 387, and following paras.

[2] See *Story's Equity Jurisprudence*, § 390.

made for necessary purposes. This instrument was witnessed by the person who was *at that time* the next (reversionary) heir to the property, and who afterwards died. In a suit to set aside the sale brought by the heir next after him, and who was not born at the time that the instrument was executed, it was held that the assent of the first heir, signified by his witnessing the conveyance, was not in law conclusive on the question of necessity, though it was strong evidence of good faith (*Madhab Chandra Hajrah* v. *Gobind Chandra Banerji and others*, IX W. R. Civ. Rul. 350). A Hindú father adopted a son and afterwards, while this first adopted son was alive, adopted a second son, such second adoption being, however, invalid by Hindú law. The first adopted son after he came of age acquiesced in a division of the property made by the father between his two adopted sons. It was held that although such first adopted son was bound by this acquiescence with regard to the property of which the father had the power of disposing by an act *inter vivos* without his consent, he was not bound thereby as to the disposition of the *ancestral* property (*Rangama* v. *Atchama and others* (IV Moo. Ind. Ap. 1.) The service of notice of foreclosure on the occupant of mortgaged property (a person who claimed as purchaser from the mortgagor, but who afterwards failed to establish this title) was held not to estop the mortgagee from disputing such occupant's title to redeem (*Prannath Rai Chaudhri* v. *Rokea Begam and others*, VII Moo. Ind. Ap. 359). A Hindú died leaving a minor son A, three daughters, B, C, and D, and a widow E. After his death and that of A during minority, E adopted a son under an alleged power conferred by will. B subsequently bore a son, and having brought a suit to establish this son's rights as heir to the property and to set aside the adoption, it was contended that she had known of and had assented to the adoption. It was held that, even if it were so, her conduct in this respect could not prejudice the rights of her son who was at the time unborn (*Tarini Charan Chaudhri* v. *Saroda Sundari Dasi*, III B. L. R. A. C. 157). A Mahomedan took out probate of a will and it was held that this did not estop his heirs from disputing the will (*Mahomed Madan and others* v. *Khodiz-unissa* alias *Khuki Bibi*, II W. R. Civ. Rul. 181.) A Hindú died leaving a widow and a minor son. On the death of the latter the widow became heir, but it was alleged that she had relinquished her rights in favour of her son's wife by a petition in which she had admitted the latter to be co-heir with her son and had allowed her name to be registered as such in the proprietary register. Having regard to the object of this petition, which was intended to obviate an objection which had been taken in a certain suit for redemption, it was held that there was no estoppel (*Massamat Lado* v. *Massamat Oodey Kunwar*, I N-W.-P. Rep. F. B. 23).

Section 31, *ante*, page 103, should be read with this Section.]

Estoppel of tenant.

116. No tenant of immovable property, or person claiming through such tenant, shall, during the continuance of the tenancy, be permitted to deny that the landlord of such tenant had, at the beginning of the tenancy, a title to such immovable property; and no person who came upon any immovable property by the license of the person in possession thereof, shall be permitted to deny that such person had a title to such possession at the time when such license was given.

["No rule," says Mr. Smith in his note to the Duchess of Kingston's case, "can be more clearly settled than that a man shall not be permitted during his possession of premises to dispute the title of the landlord under whom he entered. The case oftenest cited for this is, perhaps, *Doe d. Knight* v. *Lady Smythe*, 4 M. and S. 347. 'It has,' said Dampier, J., in that case, 'been ruled often that neither the tenant nor any one 'claiming by him can dispute the landlord's title. This, I believe, has 'been the rule for the last twenty-five years, and, I remember, was so 'laid down by Buller, J., upon the western circuit.' Accordingly, in *Doe d. Bullen* v. *Mills*, 2 B. and Ad. 17, it was held that if a tenant consents to give up possession to a party claiming by a title adverse to his own landlord, that party is estopped, as the tenant would have been, from disputing the landlord's title." This rule has been acknowledged and acted upon in India (*Mussamat Purnia* v. *Sheikh Torab Ali*, III R. J. & P. J. 14: *Jainarain Bose* v. *Kadimbini Dasi*, VII B. L. R. 723, note). In the case of *B. Donzelle* v. *Kedarnath Chakravartti*, VII B. L. R. 721, A had executed a *kabuliyat* to B, the *zemindár*. B subsequently granted a *patni* lease to C, who sued A for rent upon the *kabuliyat* executed in favour of his superior landlord. A admitted the execution of the *kabuliyat*, but pleaded that B was not the real owner, being merely a *benamidár* for her husband. It was contended that A was estopped from denying B's title; but it was held that the technical doctrine of estoppel had no application and that it was open to A to prove his plea. This case was decided before the Indian Evidence Act came into operation, and it may be questioned whether it will be good law now that this Act has come into force. Although one of the learned Judges, who decided it, expressly based his decision on the ground that the English doctrine of estoppel did not apply to India, it is possible to argue that A's plea was wholly consistent with that doctrine, inasmuch as that plea was substantially not a denial of his landlord's title but an assertion that B was not his

landlord, but merely an agent or trustee for the real landlord. It has been decided in England that where premises are let by the agent of an unnamed landlord, as such, the tenant who has gone into possession is estopped from disputing the title of the unnamed landlord when disclosed.[1] The case is much stronger when the real landlord's name was known at the time that the lease was executed and the name of a third party was used with the knowledge and consent of the real parties to the contract. See also the case of *Bipin Behari Chaudhri* v. *Ram Chandra Rai and others*, V B. L. R. 235.

Licensee.

An example of the principle applied to a licensee is supplied by the case of *Doe d. Johnson* v. *Baytup*, 3 Adolphus and Ellis's Reports 188, in which the defendant asked leave of the party possessed to get vegetables in the garden, and having thus obtained an entrance, took possession of the house, claiming a title. It was held that he was estopped, and that if he wanted to establish his title, he must first give up possession to the party by whom he was let in.

Tenant may show expiry, &c., of Landlord's title.

Although a tenant may not during the continuance of the tenancy deny that his landlord had a title at the beginning of such tenancy, he may show that such title has expired or has been defeated by a title paramount. Here he does not dispute the title but confesses and avoids it by matter *ex post facto*.

The tenant may not deny that his landlord had a title *at the beginning of the tenancy* These words will doubtless lead to numerous decisions as to what constitutes the beginning of a new tenancy or the continuance of a tenancy previously existing. English text-writers in discussing the principle have generally spoken of *the letting into possession* as that which creates the estoppel, and the application of the principle has in more than one case[2] depended upon the answer to the question what constitutes a letting into possession. "In one case," says Mr. Taylor, "where a party was in possession of premises without leave obtained from any one, and a person came to him and said, 'you have no right to the premises,' upon which he acquiesced and took a lease from this person, the Court held that the relation of landlord and tenant was sufficiently created to debar the one from disputing the title of the other. But, in a subsequent case, where a tenant being already in possession of premises under a demise from a termor, had, at the expiration of the termor's right, when his own title also expired,

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[1] II Smith's Leading Cases, 5th Ed. 710.

[2] See the remarks of Tindal, C. J., in *Claridge* v. *Mackenzie*, 4 Manning and Granger's Reports, 152.

entered into a parol agreement with another party, to hold the premises under him: but it appeared that he had done so in ignorance of the real facts of the case, and under the supposition that this party was entitled to the premises; it was held that the agreement was not equivalent to the first letting into possession. This question may, in certain cases, become highly important, because neither a parol agreement by a tenant to hold premises of a party, by whom he was *not let into possession*, nor an attornment, nor an actual payment of rent to such party, even under a distress, will in themselves operate as estoppels, but the tenant may still show that he has acted in ignorance, or under a misapprehension of the real circumstances, or, in the case of payment of rent, that some other party was entitled to receive it." § 90.

Effect of payment and receipt of rent.

It will be convenient to consider here the effect of the receipt and payment of rent as admitting the relation of landlord and tenant on the part of the former and of the latter respectively. In the case of *Doe d. Harvey* v. *Francis*, 2 Maclean and Robinson's Scotch Appeals 57, Patteson, J., said "that, where a tenancy was attempted to be established by mere payment of rent, without any proof of an actual demise or of the tenants having been let into possession by the person to whom the payment was made, evidence is always admissible on the part of the tenant to explain the payment of rent and to show on whose behalf such rent was received." It has been held, however, that the tenant will be concluded by payment of rent, if he cannot show that it was paid under a mistake or that some other person was entitled to it, or cannot show some special reason to the contrary. Submitting to a distress and paying rent under it is a strong admission of title in the distrainer, but it is not conclusive and may be rebutted by showing that he never had any title. A distress by the landlord admits the tenancy to be a subsisting relation up to the time of distraining. Speaking generally, these principles have been followed in India. See the following cases, *viz.:—Obhai Gobind Chaudhrí* v. *Bigai Gobind Chaudhrí*, IX W. R. Civ. Rul. 162 (Admission of payment of rent held equivalent to admission of tenancy in the absence of evidence to rebut): *Bení Madhab Ghose* v. *Takúr Das Mandal* (Full Bench), IX W. R. Civ. Rul. 71 (Payment of rent not conclusive, but only *primâ facie* evidence, which the tenant is not estopped from rebutting if he can). It has been held that the resumption of lakheraj land does not dissolve the contract between the landlord (former *lakherajdár*) and his tenant, but that the tenant has the option either to determine the tenancy or consent to have the revenue payable to Government by his landlord, or a portion of it, added to his former rent (*Massamat Farzhara Banú and others* v. *Massamat Azízanissa Bibí and others*, B. L. R. F. B. Rul. Part I, p. 175).

When a person purchased an under-tenure alleged to be transferable and contended that the *zemindar* by receiving rent from him had conclusively admitted him as purchaser to be his under-tenant, it was held that mere acceptance of rent could not have such an effect, though it might be otherwise if such acceptance were with notice or full knowledge of the facts. In the absence of such notice it was observed that the payments might have been voluntary payments, or payments such as that of a mortgagee to save his own interest, which a zemindar is not bound to recognize (*Mirtan Jai Sirkar* v. *Gopal Chandra Sirkar*, II B. L. R. A. C. 133: *Gaur Lal Sirkar* v. *Rameswar Bhumik*, VI B. L. R. Appen. 92). It has been held that Government were not estopped from claiming land as an escheat in default of heirs by having received revenue from a person who had entered after the death of the proprietor who left no heirs (*The Government* v. *Giridhari Lal Rai*, IV W. R. Civ. Rul. 13). Where a landlord with full knowledge of the facts accepted rent from his tenant's mortgagee, it was held that he was thereby estopped from disputing the mortgage (*Ganga Bissen and others* v. *Ram Gut Rai*, II N-W-P Rep. 49.

If a landlord sue A for rent, and afterwards discover that A only holds *benami*, while B is the real tenant, he is not thereby estopped from suing B afterwards on his discovering the real state of things (*Prosonno Kúmar Paul Chaudhri and others* v. *Kailas Chandra Paul Chaudhri*, VII W. R. Civ. Rul. 428, and II Jur. N. S. 327: *Bipinbehari Chaudhri* v. *Ram Chandra Rai and others*, V B. L. R. 235: *Jadúnath Paul* v. *Prosunnonath Dutt and others*, IX W. R. Civ. Rul. 71: *Hiralal Bakshi* v. *Rajkissore Mazimdar and others*, W. R. Special Number 58). In this last case, which was heard by a Full Bench, Peacock, C. J., said:—"It was necessary to try whether Híralal was the real proprietor, and whether Rúpchand was merely his agent or not. The Judge had power to determine that question, and has found that the *izarah* was *benami* and that Hiralal was the actual farmer and the person beneficially interested in it. That being so, we are of opinion that Híralal, as the real proprietor, was liable for the arrears of rent. It is a general rule of English law that when an agent enters into a contract in his own name as principal without disclosing the fact that he is acting merely as agent, the principal when discovered is liable to be sued upon the contract. But the principal is not liable upon the contract of his agent, if the other party to the contract with full knowledge of the facts, and having the power and means of deciding to whom he will give credit, elects to give credit to the agent in his individual character.[1] This rule is founded on principles of justice, and is applicable as well in this country as in England." It is also a rule of English

[1] See *Paterson* v. *Gandasequi*, *Addison* v. *Gandasequi*, *Thomson* v. *Davenport*, II Smith's Leading Cases 295, 302, and 309.

law that when the agent contracts in his own name as principal, parol evidence, though admissible to charge the real principal, is not admissible to discharge or exonerate the agent. Where the contract on the face of it purports to have been made between A and B, and it is sought to show by oral evidence that not A and B, but A and C were the contracting parties, it may be said that this is really introducing oral evidence to contradict the writing. Norman, J., took this view in *Bipinbehari Chaudhri* v. *Ram Chandra Rai*, V B. L R. 243, and was of opinion that it could not be done. Whether the provisions of the Evidence Act alter the question is a point about which there may be a difference of opinion. Certainly Section 92 (*ante*, page 316) makes no exception in favour of the admissibility of this evidence, unless indeed it can be brought within Proviso (5) relating to usage or custom.[1] See, however, Section 233 of the Indian Contract Act, IX of 1872.

There is one more point connected with the present subject which it will be desirable to notice, more especially as the rule in India does not agree with the rule in England. Under English law, a tenant by accepting a lease for a new term, even less than the existing one, is held impliedly to surrender the latter. Some doubt has been of late years thrown upon this doctrine in England: but it may safely be said that it has no application to land in India out of the Presidency towns, it being notoriously customary for tenants who hold protected tenures to accept fresh leases upon every change of proprietorship whether by inheritance, private sale, or auction-purchase. The new lease is generally regarded as confirmatory of the tenure, and the fact of the tenure being an old one is occasionally mentioned therein.]

Estoppel of acceptor of bill of exchange, bailee or licensee.

117. No acceptor of a bill of exchange shall be permitted to deny that the drawer had authority to draw such bill or to endorse it, nor shall any bailee or licensee be permitted to deny that his bailor or licensor had, at the time when the bailment or license commenced, authority to make such bailment or grant such license.

Explanation (1).—The acceptor of a bill of exchange may deny that the bill was really drawn by the person by whom it purports to have been drawn.

Explanation (2).—If a bailee delivers the goods bailed to a person other than the bailor, he may

[1] See II Smith's Leading Cases, 5th Ed., 333 — 334: and the remarks of the Chief Justice in *Trueman* v. *Loder*, 11 Adolphus and Ellis's Rep. 595.

prove that such person had a right to them as against the bailor.

["The acceptance of a bill of exchange," says Mr. Taylor, "is also deemed a conclusive admission, as against the acceptor, of the signature of the drawer, and of his capacity to draw; and, if the bill be payable to the order of the drawer, of his capacity to indorse; and, if it be drawn by procuration, of the authority of the agent to draw in the name of the principal; and it matters not, in this respect, whether the bill be drawn before or after the acceptance. The law, however, in general recognizes no such admission on the part of the acceptor, either of the signature of the payee, though he be the same party as the drawer, or of that of any other indorser: and this, too, although, at the time of the acceptance, the indorsements were on the bill. Neither does the acceptance admit that an agent, who has drawn a bill by procuration, payable to the order of the principal, has authority to indorse the same. So, if on a bill payable to the order of the drawer the name of a real person as drawer and indorser be forged, it seems that the mere acceptance of such bill, in ignorance of the forgery, will not preclude the acceptor from denying the genuineness of the indorsement, though it be in the same handwriting as the drawing which he is bound to admit; but if the acceptor with knowledge of the forgery puts the bill in circulation, he will be estopped from disputing the validity of the indorsement equally with that of the drawing." § 778. See also Story on Bills of Exchange, §§ 113, 114, 115, 252, 262, 412.

As to *Bailments*, see Chapter IX, Sections 148—181 of the Indian Contract Act, IX of 1872. Section 167 enacts that if a person, other than the bailor, claims goods bailed, he may apply to the Court to stop the delivery of the goods to the bailor and to decide the title to the goods.

The Act is silent on the subject of *Agents*, who are also generally considered to be estopped from denying the title of their principals (Story on Agency, § 217). It is possible, however, that the rule as to bailees will meet all cases in which agents are usually supposed to be estopped.]

CHAPTER IX.

Of Witnesses.

Who may testify.

118. All persons shall be competent to testify unless the Court considers that they are prevented from understanding the questions put to them, or from giving

rational answers to those questions, by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind.

Explanation.—A lunatic is not incompetent to testify unless he is prevented by his lunacy from understanding the questions put to him and giving rational answers to them.

[The tendency of modern legislative progress, discriminating between the *competency* and the *credibility* of witnesses, has been to remove former grounds of exclusion and to admit to the witness-box all persons, from whom even a grain of truth can be gleaned, leaving it to the Court to attach to their evidence that amount of credence, which it appears to deserve from their demeanour, deportment under cross-examination, motives to speak or hide the truth, means of knowledge, powers of memory, and other tests, by which the value of their statements can be ascertained, if not with absolute certainty, yet with such a reasonable amount of conviction as ought to justify a man of ordinary prudence in acting upon those statements. To Mr. Bentham and Lord Brougham are due the results which have been achieved in this respect in England. The sound theories of the former, and the practical wisdom and legal ability of the latter, have produced the present satisfactory state of the law thus described by Mr. Warren:—"As the admission of evidence generally is the rule and the exclusion of it the exception, so it is with witnesses. Their competency is the rule: their incompetency the exception, and that incompetency lies now within a very narrow compass. With the admission of the very parties themselve in civil cases, subject to few and specified exceptions, disappeared the last vestige of exclusion in civil cases. . . . . Such questions as can now be raised as to the competency of a witness must be determined by the Judge. Once declared by him competent, the credibility of the testimony given by the witness is determined by the jury alone, or by the Court or a Judge, where respectively empowered or required to determine questions of fact either with or without juries." (Law Studies, Vol. II., p. 1,110: and see *ante*, page 13.)

The above Section of the Indian Evidence Act extends admissibility to its utmost reasonable limits, for it declares *all persons* to be *competent* to testify, unless they are in the opinion of the Court unable to understand the questions put to them or to give rational answers to those questions.

An important question may be, and I believe has already been, raised under this Section, as to whether an accused person in a criminal case

can be examined as a witness on his own behalf. The Madras High Court, sitting on the original side, is said to have decided the question in the negative. In order to testify, it may be observed, that an oath or solemn affirmation must be administered to the person called as a witness. The Code of Criminal Procedure, while expressly and amply providing for the examination of the accused person, enacts that "no oath or affirmation shall be administered to the accused person." (Section 345.) This clearly shows that it was not the intention of the Legislature that accused persons should be competent witnesses on their own behalf, at least in cases governed by the Code of Criminal Procedure. This Code does not apply to the High Courts on their original side: but there is no indication of any other intention as regards accused persons tried by these tribunals.

Where there are several persons jointly accused, the rule followed in England has been that any one of them may be called as a witness either for or against his co-defendants, excepting only in those cases where the indictment is so framed as to give him a direct interest in obtaining their discharge: and this rule has been expressly approved of in India (*The Queen* v. *Ashraff Sheikh and others*, VI W. R. Crim. Rul. 91). There does not appear to be anything in the Evidence Act or in the new Code of Criminal Procedure which conflicts with such a rule.]

Dumb witnesses.

119. A witness who is unable to speak may give his evidence in any other manner in which he can make it intelligible, as by writing or by signs; but such writing must be written and the signs made in open Court. Evidence so given shall be deemed to be oral evidence.

Married persons in Civil and Criminal Proceedings.

120. In all civil proceedings the parties to the suit, and the husband or wife of any party to the suit, shall be competent witnesses. In criminal proceedings against any person, the husband or wife of such person, respectively, shall be a competent witness.

Witness may be competent without being compellable.

[Section 118 declares all persons, speaking generally, to be *competent* witnesses; but a person may be a *competent* without being a *compellable* witness. His testimony may be admissible if he be examined, or if he offer himself as a witness, but he may have some

protection or privilege, so that, if he be unwilling, he cannot be compelled to give evidence. This protection or privilege may be general as regards the whole of a case; or it may concern only some particular subject of evidence, so that the same person may be at one time compellable and at another time not compellable, and this even in the same examination. Again, there are some rare instances in which the law goes still further and will not permit the witness to speak, even if he be willing. The eleven sections which follow will supply illustrations of these remarks. Formerly, *parties* to civil suits and the *husbands and wives of parties* were not competent as witnesses. It was thought that the interest they had in the subject-matter of the dispute must make their testimony unreliable, if not false. We have seen (*ante*, page 13) under what auspices the law on this point was altered in England and in India. As to the mode of *compelling* parties to give evidence in civil cases in India the following sections of the Code of Civil Procedure are important, *viz*:—

161. *When a party to a suit appears in person* at any hearing of the suit, he may be examined as a witness either in his own behalf or on behalf of any other party to the suit, in the same way as if he were not a party thereto.

162. If any party to a suit shall *require to enforce the attendance of any other party* thereto as a witness, he shall, by himself or his pleader, make a special application to the Court for an order requiring the attendance of the party, and shall show, to the satisfaction of the Court, sufficient grounds in support of such application, otherwise a summons shall not be issued.

163. The Court, if it think fit, may, before making such order, cause *notice* to be given to the party or his pleader, fixing a day for such party *to show cause* why he should not attend and give evidence; and may also, from time to time, if necessary, for good and sufficient reason, enlarge the time for such purpose.

164. *In support of the cause shown*, the Court shall receive any declaration in writing of the party, on unstamped paper, if signed by him and verified in the manner herein-before provided for the verification of plaints, and delivered into the Court by himself or his pleader.

165. If *no sufficient cause* be shown on the day fixed, or upon any subsequent day to which the Court shall enlarge the time for that purpose, the *Court shall issue its* order requiring the party to attend and give evidence.

166. *If the Court shall think it necessary for the ends of justice* to examine any party to the suit or to inspect any document in his possession or power, the Court may, of its own accord in any stage of the suit, cause such party to be summoned to attend as a witness to give evidence or to produce such document, if in his possession or

power, on a day to be appointed in the summons, and may examine such party as a witness in open Court, or may cause such party to be examined in such other manner as the Court may direct.

Suits under the Divorce Act.

Parties to suits instituted in consequence of adultery and also their husbands and wives were formerly incompetent as witnesses in such suits. The law on this subject has been recently altered in England by the 32 & 33 Vict. Cap. 68, Section 3, with this proviso, that no witness, whether a party to the suit or not, shall be liable to be asked or bound to answer any question tending to show that he or she has been guilty of adultery, unless such witness shall have already given evidence in the same proceeding in disproof of his or her alleged adultery. Section 51 of the "The Indian Divorce Act," IV of 1869, enacts that "any *party* may offer himself or herself as a witnness, and shall be examined, and may be cross-examined and re-examined like any other witness": and Section 52 enacts that "on any petition presented by a wife, praying that her marriage may be dissolved by reason of her husband having been guilty of adultery coupled with cruelty, or of adultery coupled with desertion without reasonable excuse, the husband and wife respectively shall be *competent* and *compellable* to give evidence of or relating to such *cruelty* or *desertion*." Whether the husband and wife are respectively compellable to give evidence relating to the fact of adultery, if they do not offer themselves as witnesses under the 51st Section, is a question about which there may be some doubt. The same question has arisen in England on the construction of the different Statutes concerned with divorce, and is, I believe, still an open one, notwithstanding the 32 & 33 Vict. Cap. 68.[1]

Husbands and Wives in Criminal Proceedings.

So much of the Section as declares husbands and wives competent witnesses against each other in criminal proceedings is contrary to the rule of English law, which forbids the admission of this evidence; but is in accordance with the Full Bench decision of the Calcutta High Court in the case of *The Queen* v. *Kheirúla and others*, VI W. R. Crim. Rul. 21. The following extract from the judgment of *Peacock*, C. J. in this case will sufficiently explain the reasons which have operated to introduce in India a rule different from that which has been followed in England :—

"Two questions have been referred in this case; 1*st*,—Whether, upon a trial in the Mofussil of a person charged with an offence, his wife is competent to give evidence for or against him? 2*nd*,—Whether, upon a

[1] See Taylor on *Evidence*, §§ 1220A, 1220B, 1220C, 1220D, and 1221; and Browne on *The Practice in Divorce and Matrimonial Causes*, &c., pp. 210—212. See also *Kelly* v. *Kelly and Saunders*, III B. L. R. Appen. 6.

trial in the Mofussil of several persons charged jointly with an offence, the wife of one of them is competent to give evidence for or against the others?

I am of opinion that both of those questions must be answered in the affirmative. It is a general rule of English Law, subject to certain exceptions, that in criminal cases a husband and wife are not competent to give evidence for or against each other. But the English Law is not the Law of the Mofussil . . . . . .
It is clear that the English Criminal Law was not the Criminal Law of the Mofussil, and that the English Law of Evidence was never extended by any Regulation of Government to criminal trials there.

Section 3, Act XV of 1852, did not render a husband or wife incompetent for or against the other in criminal cases. It merely declared that nothing in the Act should render them competent.

Act II of 1855 *did not affect the matter now under consideration.* It is clear that Section 14 did not render a wife competent to give evidence against her husband in a criminal case. It declared that the persons therein mentioned only should be incompetent to give evidence. It rendered them incompetent in all cases, but it did not render any person competent or incompetent with reference to particular persons or particular cases. Section 20 applied to civil proceedings only; and Section 58 declared that the Act was not to be so construed as to render inadmissible in any Court any evidence which, but for the passing of the Act, would have been admissible in such Court. It should be observed that at the time when Acts XV of 1852, and II of 1855 were passed, the Mahomedan Criminal Law, as modified by the Regulations, was the general Criminal Law of the country. . . . . .
. . . In Mussamat Mughni *v.* Ohariya, 1 Nizamat Adálat Reports, 144, the evidence of the prisoner's wife was admitted, in corroboration of other evidence, against him to support a sentence of death or other punishment by Seasut. In 2 Nizamat Adálat Reports for 1852 page 156, Mr. Mills, in a case of culpable homicide, says, "though the "testimony of a wife against her husband may be received in our Courts "yet the practice of summoning a wife to give evidence against her hus-"band has been always held to be objectionable, and it is one which "should on no account be encouraged." In 2 Macnaghten's Nizamat Adálat Reports, 150, the Court observed, "the wife of the prisoner was "called to give evidence against him, though her evidence was wholly "unnecessary; that the practice of summoning such a near relation to "the prisoner as a witness for the prosecution, *excepting in case of urgent* "*necessity*, was *considered highly objectionable*, and the Court directed "that such a practice should be discouraged." In 3 Macnaghten's Reports, it was held, contrary to the *futwas* of all the law officers, that the evidence of a son was admissible against his father in a criminal case.

But it is not necessary to allude further to these cases, except to show that *it was the practice of the Nizamat Adálat to admit the evidence of a wife against her husband*, or a son against his father, in criminal cases, in which the sentence was by Seasut. I do not, however, place much reliance on those cases, as they were decided under a very different system of law from that which now exists. Still they show that at that time the evidence of a wife was legally admissible. *The Mahomedan Criminal Law, including the Mahomedan Law of Evidence, is no longer the law of the country. It has been superseded by the Penal Code and the Code of Criminal Procedure, so far as they go, but they do not touch upon the rules of evidence.* After the passing of the Penal Code and the Code of Criminal Procedure, Regulation IX of 1793, by which the Mahomedan law, as modified by the Regulations, was established as the general Criminal Law of the country, and many other Regulations bearing upon the same subject, were repealed by Act XVII of 1862. A Code of Evidence has not yet[1] been passed, and we have no express rule laid down by the Legislature in any existing law upon the subject now under consideration. *By the abolition of the Mahomedan Law, the Law of England was not established in its place.*

I know, therefore, of no law which renders a husband or wife incompetent to give evidence against the other, or which excludes the evidence of others who are bound by the closest ties of relationship.

It has, however, been held by a Division Court that the evidence of a wife is not admissible against her husband in a criminal case, even in corroboration of other evidence (*Regina* v. *Gaurchand Polie and Dwarki Polie*, I Weekly Reporter, Rulings in Criminal Cases, 17).

In that case the Judges say:—"We think that the evidence of the "wife against her husband should not have been received. It is true that "there are cases published in the earlier Reports of the Nizamat Adálat, "in which the evidence of the wife has been received against the hus-"band, in *corroboration* of other evidence; but this practice has been "reprobated by later decisions of the same Courts, and is certainly opposed "to the general principle of all Criminal Law. The Judge has quoted "Section 20, Act II of 1855, but this Section refers to civil proceedings. "The Judge would hardly condemn a wife who committed perjury for "her husband, and, on the other hand, he would most likely discredit "her if she appeared too willing a witness against her husband."

With reference to that part of the judgment in which it is said that the practice has been reprobated in later decisions, I would remark that it was merely the practice of compelling a wife to give evidence against her husband, when her evidence was not necessary, that was reprobated, and that it is to be inferred that the evidence is admissible, although

[1] The above judgment was delivered in 1866.

the attendance of a wife against her husband ought not to be compelled when not necessary. In this I entirely concur. . . . . .

If these arguments are not sufficient to show that the rule of exclusion in England is merely a rule of positive law, and not one depending upon the fundamental principles of natural justice, I would adopt the arguments of the eminent and highly distinguished jurist, Mr. Livingstone, in his introductory Report to the Code of Evidence prepared by him for the State of Louisiana. He says:—

Mr. Livingstone's Arguments.

"The exclusion of interested testimony having been examined and "found to be injurious to the investigation of "truth, and its admission to be attended with "no inconvenience, which may not be reduced "to one of a quantity that has no assignable value, it of course finds "no place in the proposed Code; and with it disappears one of the most "fruitful sources of uncertainty, expense, delay, and inconvenience in "the law. If the search after truth requires that interested witnesses, "and even the parties themselves, should be interrogated to discover it, "are there any relations in which the offered witness may stand to the "parties that exclude his testimony? By the English law, and, of "course, in the several cases which have been noticed by ours, there are "several, husband and wife, &c.

I. "The Code now offered does not contain the exclusion of husband "or wife as witnesses for or against each other; because the reporter "does not find any one sufficient among the reasons by which it is "supported in the English decisions or commentaries. The first of "these alleged reasons is, that their interests are identical (2 Starkie, "706, 1 Bl. 443). But in a system which discards interest as an objec- "tion to competency, this reason fails of course. The second is said, "by the same authority, to be '*on grounds of public policy*' *to prevent* "*distrust and dissension between them, and to guard against perjury.* In "the case before us the public evils are designated: *first*, the danger "of domestic dissension; *secondly*, the danger of perjury. The first, "if the evidence should be against the party connected with the wit- "ness; the second, if it should go to exonerate him. The argument "supposes that if the husband or wife be called as a witness in a suit "to which the other is a party, one of two things must happen: either "unfavourable truths will be told, which it is said will disturb the family "peace, or perjury will be committed to preserve it. Now, these are "two opposite and contradictory reasons. If the danger be, that family "discussions will grow out of the testimony, then that of perjury is "avoided; if the danger be perjury, then that of family discord need "not be apprehended. But legislation must be founded on the general "application of its reasons, not on the tendency of its measures to good "or evil in particular instances. If the connection by marriage be so

"close as to make the parties incur the danger and disgrace of giving "false testimony for the other, then let the case be examined solely "with a view to the evil of placing the witness in a situation where "strong motives are offered to him to commit a crime. If the pre-"dominant risk be that of destroying domestic harmony, let that be "assigned as the reason. But to allege both, when they are contradic-"tory, is a strong presumption that neither can safely be relied upon. "Both, however, will be examined, and both contrasted with the evils "which attended the exclusion.

"First, let us suppose that domestic dissension is the danger; that "is to say, that one spouse will quarrel with the other for telling the "truth in a Court of Justice, when it makes against the interest of the "other. But in most cases the interest is common between them, there-"fore there is little probability that any ill-will can be created in the "mind of the one against the other for not committing perjury, in order "to protect a common interest. The supposition that a domestic broil "may ensue from a cause like this, is to suppose the party raising it "corrupt in expecting falsehood from his or her spouse, and malevolent "in resenting his disappointment; and the law cannot reasonably be "required to make any great sacrifice for preserving the harmony of so "ill-assorted a union as that which such a case supposes. The dissen-"sion arises from the performance of a duty,—bearing open testimony "of the truth; and avoiding a crime,—the commission of perjury; and "because a brutal, corrupt, or passionate husband may quarrel with his "wife for avoiding the crime, shall the law declare that the wife shall "not perform the duty? It will watch over domestic peace by punish-"ing those that disturb it, and, for proper causes, by dissolving the "bond of an ill-assorted connection; but it ought never to say that "the one party shall be exempted from the performance of an import-"ant public duty, because the other is tyrannical and unjust. The "argument supposes, too, that there is greater danger to domestic "happiness from this than from any other source; but is there any "foundation for the belief? Not one case in a thousand, it is believed, "will occur in practice where any improper excitement will be created "by an adherence to the truth, although it should militate against the "wife or the husband of the party who states it. Why should it more "in this case than in that of any other witness? Mutual affection, the "knowledge that it was the performance of a duty required by law, "and that it could only be avoided by a crime, are so many and such "cogent reasons to prevent ill-will on the occasion, that it it astonish-"ing how this reason could find favour with the great lawyers who "have assigned it as an argument in favour of their rule; more "especially when they themselves most explicitly discard this reason by "declaring that the wife shall not be allowed to appear as a witness

"against the husband even if he consents, or after a divorce; nor "against the interest of his heirs after his death (2 Starkie, 706; 6 East, "192). How connubial happiness can be disturbed by a compliance on "the part of the wife with her husband's request while united, or by "any act after the connection has been dissolved by death or divorce, "these learned Doctors of the law alone can explain.

"Examine the opposite reason, the danger of perjury; that is to say, "the matrimonial union is so strict, that the one party to it will incur "all the dangers of punishment and infamy rather than tell the truth "when it is injurious to the other; and the law, it is said, holds out "this irresistible temptation to the witness when it permits him to be "examined; yet, by the preceding argument, the temptation is easily "resisted, the truth will be told, and this strong connection is so weak, "that it is broken merely on that account.

"But the arguments must be destroyed, not by opposing the one to "the other, but both of them to the truth. There is no doubt that in "this, as in many other cases, minds may be found that will waver "between the declaration of truth that may hurt their interests or their "feelings, and the assertion of a falsehood that, in their opinion, may "secure both from injury; but can the law be said to hold out a tempt-"ation to perjury when it orders a party, under those circumstances, to "tell the truth? If there were no temptations to conceal the truth, or "assert a falsehood, there would be no need of oaths. *Oaths, and the "penalties for breaking them, were made for the purpose of counteract-"ing that disposition. If they were to be dispensed with in cases where "that disposition exists, there would be no need for them in any others.* "In every such case, then, it may with equal reason be said that the "law holds out a temptation to perjury, because it exacts the oath to "tell the truth, when there is an inclination to conceal it; and the "argument would extend with equal reason to the abolition of oaths, "and the penalties for the breach of them. This exclusion is at vari-"ance, too, with other provisions of the law as they already exist. The "party himself may be interrogated in Chancery in England, and in all "cases at law here. The wife may be interrogated to support an "accusation made by herself against her husband, for a personal injury, "in some cases affecting his life; yet she is not permitted to prove a "fact that would save him from an ignominious death on a charge "brought against him by another. Now, in all these cases, the danger of "perjury is equally great, or greater, unless we suppose the attachment "of a wife to her husband's interest superior to his own, or her desire "to make good her own charge less intense than that which she would "feel to support the accusation brought by another. The danger of "perjury is no greater in this than in other cases in which it is incurred "without scruple—in the dearest connections of nature, father and son,

"mother and child, brother and sister, friendships of the most intimate "kinds, habits of intimacy during a long life—the parties to all these "are every day arrayed for and against each other as witnesses, and the "law interposes no other safeguard to their consciences than its penal-"ties and the danger of infamy by detection. No rule of exclusion "protects the witness against the influence of his affections or his "interests. He is heard, and the degree of connection is weighed "against his character and the probability of his story; the counsel "cross-examine, the public inspect, the jury interrogate and calculate "and determine, and no inconvenience is felt in those cases. Why "should there be in this?

"Having stated the general principle, that every party to a suit has "a right to all the information in relation to his cause, of which he "ought not to be deprived, but for reasons of great public or private "inconvenience; and examined, by discussing the reasons for exclu-"sion in this case, whether it offers any such inconvenience; let us "now examine the particular evils attached to the rule as it now stands.

"In criminal cases the evil is most apparent. Suppose the husband, "accused by positive, but perjured, testimony of a crime affecting "his life, and the wife the only witness of a fact that would prove "his innocence—no matter what circumstances she could adduce to "corroborate her testimony; no matter what intrinsic evidence it "contained; no matter what perfect conviction it would produce of its "truth, it is sternly excluded; and the innocent husband is executed "because '*public policy requires that the peace of families should not* "*be disturbed, and that no temptations should be held out to perjury.*' "In this case—by no means an improbable one—there is positive evil, "cruel injustice, heart-rending distress. In the case which the law "attempts to guard against, inconvenience, only if it occurs—but an "inconvenience highly improbable to happen, inasmuch as it is supposed "to affect domestic union; and as it is believed to be a temptation to "perjury, not one strong enough to produce the effect, or, should it be "yielded to, it would be capable of detection by the usual means. But "even without supposing the extreme case of life or death, *the suppres-* "*sion of testimony is in all cases an evil; and the law deprives a party* "*of a certain right to avoid a problematical inconvenience.*

"On the other hand, suppose the testimony of the wife necessary "to procure the conviction of the husband; she is the only witness "to a murder he has committed. *This I consider the strongest ground* "*for the exclusion; it enlists the feelings, and they are most frequently* "*found on the right side.* Shall a wife be forced to give testimony "that will condemn her husband, the father of her children, to infamy "and death, or take refuge in the crime of perjury to avoid it? I con-"fess that if the alternative could be avoided, a humane lawgiver would

"not enjoin it; but if sympathy for individual distress should not be "entirely rejected, it ought never to be entertained when its indulgence "would lead to more extensive injuries to the community. A wise and "provident legislator must have the consequences of every legal pro-"vision as present to his mind as its immediate operation is to his "senses; and in applying this rule to the subject under consideration, "he should not, in tenderness to the feelings of conjugal affection, "permit the husband or wife to escape punishment for a crime, or "defraud another of his right, by declaring that the only witness of "the offence, or the wrong, shall not be heard. Some crimes cannot be "perpetrated without the aid of an accomplice. The accomplice may "betray the principal. The fear of this treachery, in many instances, "may prevent the crime, or a person may not be found willing to "engage in the enterprise. But, by the rule of exclusion, the law "furnishes an assistant who can never betray, and one who is always "at hand; and thus gives a facility to the commission of offences, "which no other cicumstance could possibly offer. Besides, public "justice requires, and common sense would seem to point out, that those "persons who are the most likely to be acquainted with the fact should "be first called on to prove it; but who so probable to know the guilt or "innocence of the party accused as the companion of all his hours, "the depository of his most secret thoughts; and what better calculated "to prevent an intended crime, than the knowledge that those from "whom it is so difficult to conceal it may be made the unwilling wit-"nesses of its disclosure? Precisely in the proportion that a man "would be encouraged to commit a crime by the knowledge that the per-"son to whom he finds it necessary to confide it cannot become a witness "against him, will be his fear of committing it when he knows that "there is no person in whom he may confide, that may not be forced "or be willing to betray him.

"So sensible of this have been the judicial lawgivers of England that "they have imposed no bar to the receiving the testimony of father and "son, mother and daughter, brother and sister, and all the other relations "of consanguinity or affinity. They have had no regard to the confi-"dences of friendship, and have thought that the affections of nature, as "well as those of habit and sympathetic feeling, should afford no obstacle "to the attainment of the ends of public justice. They have gone "further, and made an exception to the rule, which they laid down as "one inviolable even by consent (2 *Starkie*, 707; *Rep. Tem. Hard*, 264), "in the case of husband and wife; and, as we have seen, have allowed "the wife to be produced as a witness against the husband on a prose-"cution for an injury done to himself. Now, mark the reason. It is "a convenient and a ready one,—from the *necessity of the case:* which "must mean, if it mean anything, that there is a necessity that crimes

"should be punished, and that, unless the testimony of the wife were "admitted, they would not in those instances be punished. Now, admit "this reasoning, and see whether it does not go to the utter destruction "of the rule to which it is offered as an exception. There is no greater "necessity for punishing a crime committed by him against another; "and if the wife is the only witness that can convict in the last case, "her testimony is as necessary as it is in the first; and being necessary "in both, it should not be admitted in one and excluded in the other. "But in truth, the inquiry is never made; and in this and in all the "other cases founded on the convenient argument of necessity, although "there may have been twenty other witnesses present, the pretended "necessary witness is admitted; and although there may be none but "him conversant of the fact, he is rejected, where it has not yet been "deemed convenient to admit the argument of necessity.

"The advantages of receiving testimony from this source so greatly "overbalance its evils, and the inconveniences and the injustice of "rejecting it are so manifest, that I have not hesitated to give this "exclusion no place in the Code." (Page 271.)

In France, according to Article 322 of the *Code d'Instruction Criminelle*, a husband and wife and other specified relations, if objected to by the accused or by the Procureur-Général, cannot be a witness for or against one another, but the President may summon and examine any person, whether such person is comprised in Article 322 or not. (See Article 269.) The witness in that case is not examined on oath. These are matters of detail to be provided for, if at all, by an express law, and not by rules to be laid down by Judges.

But even if the rule of English law is founded upon sound and just principles, with reference to the state of society in England, it appears to me to be wholly inapplicable to the natives of this country, and to their social institutions and relations. A law which may be politic and just in a Christian country, in which a man is prohibited from having more than one wife and a woman from having more than one husband, may be wholly inapplicable to a country in which polygamy is allowed. Can the legal fiction, that a man and his wife are one person, apply to a Koolin Brahmin and his fifty wives, or to a woman in Malabar and her several husbands?—or should the evidence of one of fifty wives against her husband be excluded lest it should cause dissension in the family? A law which should allow a wife to give evidence against her husband in a case of personal injury committed upon her, and would not allow her evidence to be either corroborated or contradicted by other wives who were present at the time, would appear to me not to be founded upon the soundest principles either of policy or justice. It would be obligatory upon the Judges to allow a wife to give evidence against her husband upon a charge of an assault

committed by him upon her, and to exclude her from testifying upon a charge against him of murdering their infant child when no one was present but themselves. Or would it be just to allow from necessity a wife to give evidence against her husband upon a charge of personal violence committed by him upon her, and to refuse the evidence of another wife on his behalf? If we had to decide this case upon our own notions of policy, I should admit the evidence of the wife, and leave the Court to judge of her credibility as in all other cases; but even if my own opinion were against the policy of admitting such evidence, I should not feel justified in rejecting the evidence of a wife, who was the only witness to the murder of her child by her husband, or in rejecting the evidence of a wife as a witness for her husband on a charge of a capital crime, preferred against him by one who admits that no one was present when the alleged crime was committed except the accuser, the husband, and his wife. *In the case of European British subjects who are governed by the law of England, we must administer that law. But in the Mofussil, where the law of England is not the law of the country, I consider that I should not be justified in excluding any witness who was not clearly incompetent* by law. *Primâ facie*, every one is competent and bound to give evidence, and every one who is charged with a crime is entitled to adduce on his behalf the evidence of any witness who can throw light upon the facts in dispute, and who is not expressly declared by the law to be incompetent. Would any Judge, unless bound by the clearest and most indisputable rule of law, condemn a prisoner to death for murder upon the evidence of the wife of another man, and, upon his own notion of public policy, reject the testimony of the prisoner's own wife in his favour? Would he do so, if it were proved that the three persons in question were the only persons present at the alleged murder, or that the husband of the witness was also present and that he had fled? We cannot import one portion of the English law and reject the remainder, without taking upon ourselves the duty of legislators. *I think that the evidence of the wife is admissible in both cases, because I do not find any law of this country which expressly provides against it.* The degree of weight to be attached to the evidence in such cases, must, as in every other case, be determined by those who have to decide upon it."

Mr. Stephen's view.

It would be difficult to add anything to the arguments used by the learned Chief Justice, Sir Barnes Peacock It must not be supposed that the rule of English law has been always approved in England without a doubt of its excellence. The following passage will show otherwise:—"Viewing the rule, therefore, with relation merely to the question of humanity, is it really humane? This is very doubtful. To an innocent man his wife's evidence may be matter of the greatest importance; and if the circumstances were such that, if she spoke falsely, she might be

contradicted, or her falsehood might be exposed by cross-examination, her evidence might carry considerable weight. A man was tried for wounding another in a common lodging-house. The principal witness against him was the *mistress* of the wounded man. *His wife* was present, and, of course, could not be examined. He exclaimed with much indignation, and not without considerable reason,—'*You have heard this woman, and will you not hear my wife!*'[1]]

Judges and Magistrates.

121. No Judge or Magistrate shall, except upon the special order of some Court to which he is subordinate, be compelled to answer any questions as to his own conduct in Court as such Judge or Magistrate, or as to anything which came to his knowledge in Court as such Judge or Magistrate; but he may be examined as to other matters which occurred in his presence whilst he was so acting.

Illustrations.

(*a.*) A, on his trial before the Court of Session, says that a deposition was improperly taken by B, the Magistrate. B cannot be compelled to answer questions as to this, except upon the special order of a Superior Court.

(*b.*) A is accused before the Court of Session of having given false evidence before B, a Magistrate. B cannot be asked what A said, except upon the special order of the Superior Court.

(*c.*) A is accused before the Court of Session of attempting to murder a Police officer whilst on his trial before B, a Sessions Judge. B may be examined as to what occurred.

Extent of the Privilege.

[It will be important to notice that the privilege of the Judge or Magistrate extends only "*to his own conduct in Court as such Judge or Magistrate or to anything which came to his knowledge in Court as such Judge or Magistrate:*" and it seems clear that, if he himself make no objection to answer the questions asked, no one else is entitled to object.[2] Arbitrators are within the rule in England. The definition of "Court" in the Evidence Act (*ante*, page 73) does not

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[1] *Stephen's General View of the Criminal Law of England*, p. 286.
[2] So per Lord Alvanley in *Martin* v. *Thornton*, 4 Espinassi's Rep. 181.

include arbitrators. There is no definition of the word "Judge" in the Act.[1]

It will be convenient to notice in this place the question whether a Judge or Magistrate can give evidence in a case tried by himself. "A Judge before whom the cause is tried," says Mr. Taylor, "must conceal any fact within his own knowledge, unless he be first sworn: and consequently, if he be the sole Judge, it seems that he cannot depose as a witness, though if he be sitting with others he may then be sworn and give evidence. In this last case, the proper course appears to be that the Judge, who has thus become a witness, should leave the bench, and take no further judicial part in the trial, because he can hardly be deemed capable of impartially deciding on the admissibility of his own testimony, or of weighing it against that of another." (§ 1244.) In the case of the *Queen* v. *Mukta Singh*, IV B. L R., Ap. Crim. 15, the above passage and the cases cited in support of the views expressed therein were referred to; and it was held that a Sessions Judge was a competent witness in a case tried by himself with the aid of assessors, provided that he had no personal or pecuniary interest in the subject of the charge. Having regard to the general terms of Section 118, *ante*, page 414, the principle here laid down is no doubt sound law at present also. It is scarcely necessary to observe that a Judge cannot import his own knowledge into a case or base his judgment on what he himself knows without making such knowledge evidence by giving his testimony in the usual way. See *ante*, page 66 (*Kishore Singh and others* v. *Ganesh Mukherji*, IX W. R. Civ. Rul. 252: and *Rousseau and another* v. *Pinto*, VII W. R. Civ. Rul. 190).

Can a Judge be a witness in a case tried by himself.

As to jurymen or assessors, Section 258 of the Code of Criminal Procedure enacts as follows:—

"If a juryman or assessor is personally acquainted wich any relevant fact, it is his duty to inform the Judge that such is the case, whereupon he may be examined, cross-examined, and re-examined in the same manner as any other witness."]

When juryman or assessor may be examined.

122. No person who is or has been married, shall be compelled to disclose any communication made to him during marriage by any person to whom he is or has been married; nor shall he be permitted to disclose any such communication,

Communications during marriage.

[1] See the definition of "Judge" in Section 19 of the Penal Code.

unless the person who made it, or his representative in interest, consents, except in suits between married persons, or proceedings in which one married person is prosecuted for any crime committed against the other.

Extent of the Protection.

["The protection," says Mr. Taylor, "is not confined to cases where the communication sought to be given in evidence is of a *strictly confidential* character, but the seal of the law is placed upon *all communications of whatever nature* which pass between husband and wife. It extends also to cases in which the interests of strangers are solely involved, as well as to those in which the husband or wife is a party on the record. It is, however, limited to such matters as have been communicated 'during the marriage;' and consequently if a man were to make the most confidential statement to a woman *before* he married her, and it were afterwards to become of importance in a civil suit to know what that statement was, the wife on being called as a witness and interrogated with respect to the communication, would, as it seems, be bound to disclose what she knew of the matter." (§ 830: and see 16 and 17 Vict. Cap. 83, Section 3.) The privilege continues even after the marriage has been dissolved by death or divorce. Where a woman, divorced and subsequently married to another man, was offered as a witness of a matter of which she had become cognizant during her first coverture, Lord Alvanley rejected the evidence, adding,—"It can never be endured that the confidence, which the law has created while the parties remained in the most intimate of all relations, shall be broken whenever, by the misconduct of one party, the relation has been dissolved." The words "has been married" in the above Section of the Evidence Act give full effect to this dictum in India. Not merely is the married person *protected* from being compelled to disclose: but further, even if he be willing, he is not to be *permitted* to disclose any communication made during the marriage, *unless* the person who made it or his representative in interest consents, and *except* in suits between married persons or proceedings in which one married person is prosecuted for any crime committed against the other. With this exception should be read Section 120, *ante*, page 416.]

Exception.

Evidence as to affairs of State.

123. No one shall be permitted to give any evidence derived from unpublished official records relating to any affairs of State, except with

the permission of the officer at the head of the department concerned, who shall give or withhold such permission as he thinks fit.

Official communications.

124. No public officer shall be compelled to disclose communications made to him in official confidence, when he considers that the public interests would suffer by the disclosure.

[The above two Sections (123 and 124) as well as Sections 121, 122, 125, 126, 127, 128, 129, 130, and 131 are applicable equally to oral and to documentary evidence (see Definition of "Evidence," *ante*, page 75, and the second proviso to Section 165, *post*).

Affairs of State.

The meaning of "affairs of State" will be rendered more intelligible by some account of the manner in which the rule has been applied in other countries. The proceedings of the *Grand Jurors* are in England regarded as privileged communications, and would doubtless have been so regarded in the Presidency towns before the abolition of the Grand Jury system. The testimony of *Petty Jurors* is, on similar grounds, inadmissible to prove *mistake* or *misbehaviour* in the jury in regard to the verdict. But the Court will admit evidence of such misconduct either from the officer in charge of the jury, or from some other person who actually witnessed the transaction. No witness, whether a peer, member of the House of Commons, officer of either House, or short-hand writer, can, without the permission of the House, be examined as to what took place within the walls of Parliament. On similar grounds, the official transactions between the *heads of the departments of Government and their subordinate officers* are in general treated as secrets of State. Thus communications between a Colonial Governor and his Attorney-General on the condition of the colony,[1] or the conduct of its officers, or between such Governor and a military officer under his authority; the report of a military commission of enquiry made to the Commander-in-Chief and the correspondence between an agent of the Government and a Secretary of State; or between the Directors of the East India Company and the Board of Control under the old law; or between an officer of customs and the Board of Commissioners—are confidential and privileged matters, which the interests of the State will not permit to be revealed. Communications between Collectors and Commissioners, and between Commissioners and the Board of Revenue, or the Government

[1] As to communications of a defamatory nature sent by a foreign consul to his own Government, see *Robert, Charriol, and another* v. *Lombard*, I Ind. Jur. N. S. 192.

would be within the rule in India. Instructions to settlement officers in the Punjab not only fall within the rule as to privilege, but Section 9 of Act XXXIII of 1871 enacts that no Court of Justice shall permit evidence to be given of the contents of such instructions. The President of the United States and the Governors of the several States are not bound in America to produce papers or disclose information communicated to them, when, in their own judgment, the disclosure would, on public considerations, be inexpedient.[1] And the same doctrine, as it would seem, prevails in England whenever Ministers of State are called as witnesses for the purpose of producing public documents. If, however, the Minister, instead of attending personally at the trial, should send the required papers by the hands of a subordinate officer, the Judge would probable examine them himself, and would compel their production, unless he were satisfied that on public grounds they ought to be withheld. In the case of *The Rajah of Coorg* v. *The East India Company*, 20 Jur., p. 407, it was decided that in a suit instituted against the East India Company to enforce *a private right*, the Company was not bound to produce certain documents, the possession of which they admitted, but resisted the production of them on the ground that some of them were political communications which, in the fulfilment of the political duty of the Company and its governments in India had passed between the Company and those governments, solely with a view to the government of India, and to enable the Company to perform its duty in that behhlf; and that the rest of them were political communications, which passed between the official agents of the Company in India in fulfilment of their public political duty, and for the purposes of the public government in India. It was also held in the same case, that the production of political documents depended, not on the question of the person called on to produce them being a party to the suit or not, but upon the danger to the public iuterests which would result from their production. *When the law is restrained by public policy from enforcing the production of papers, the like necessity restrains it from doing what would be the same thing in effect, namely, receiving secondary evidence of their contents.* It has, however, been held that in an action of trespass brought against the Governor of a colony, a military officer under his control might be asked, in general terms, whether he did not act by the direction of the defendants, though the written instructions could not be given in evidence. In the case of prosecutions against the Governor-General of India or any member of Council, the 21 Geo. III, Cap. 70., Sec. 5, provides for compelling the production of the

[1] The New York Civil Code, § 1710, r. 5, enacts that "a public officer cannot be examined as to communications made to him in official confidence when the public interests would suffer by the disclosure." Section 124 of the Evidence Act adopts similar language.

order or orders in Council complained of, and for the examination of witnesses upon the matter of the complaint: and thus creates an important statutory exception to the general rule.

Communications, though made to official persons, are *not privileged where they are not made in the discharge of any public duty*; such, for example, as a letter by a private individual to the Chief Secretary of the Postmaster-General, complaining of the conduct of the guard of the mail towards a passenger.[1]

Who is to decide as to whether the evidence shall be given.

It will be observed that it is not the Judge but the public officer concerned, who is to decide as to whether the evidence referred to in Sections 123 and 124 shall be given or withheld. This is in accordance with the rule laid down in the English case of *Beatson* v. *Skene*.[2] One of the Judges who decided that case was of opinion that, when a Judge is satisfied that a document may be made public without prejudice to the public service, he ought to compel its production, notwithstanding the reluctance of the head of the department to produce it. The whole Court further were agreed that cases might arise where the matter would be so clear that the Judge might well ask for the document in spite of some official scruples as to producing it. A similar rule may be deduced in India from the above Sections when read with Section 162, *post*, which makes no exception to the general provision therein contained, that the validity of any objection to produce shall be decided on by the Court. The second paragraph of this Section is:—"The Court, if it sees fit, may inspect the document, *unless it refers to matters of State*, or take other evidence to enable it to determine on its admissibility." The position of the words italicised shows that the Court, although it may not inspect a document relating to matters of State, may yet take other evidence to enable it *to determine on its admissibility*, which *ipso facto* shows that it was intended to give the Court power to determine on such admissibility.

In cases tried with a jury, the Judge is to decide all questions as to the admissibility of evidence (see Section 256 of the Code of Criminal Procedure). In *Beatson* v. *Skene* it was held that whenever the question whether a communication was privileged or not, involves matter of fact, it should be left to the jury. Reading together Sections 256 and 257 of the Code of Criminal Procedure, it may be doubtful if this rule would be held to be law in India.]

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[1] Tay. §§ 864, 865, 866.

[2] 6 Jur. N. S. 780; and 29 L. J. Ex. 430.

Information as to commission of offences.

125. No Magistrate or police officer shall be compelled to say whence he got any information as to the commission of any offence.

["It is perfectly right," said Eyre, C. J., in Hardy's case,[1] "that all opportunities should be afforded to discuss the truth of the evidence given against a prisoner; but there is a rule which has universally obtained, on account of its importance to the public for the detection of crimes, that those persons who are the channel by means of which the detection is made, should not be unnecessarily disclosed." The rule in England is that witnesses for the Crown will not be *permitted* to disclose the names of their employers or the nature of the connection between them, or the names of the persons from whom they received information or the names of the persons to whom they gave information. The above section only enacts that no Magistrate or Police officer shall be *compelled* to say, but it does not prohibit him if he be willing to say, whence he got his information. It is wholly silent as to persons other than Magistrates or Police officers.]

Professional communications.

126. No barrister, attorney, pleader or vakíl, shall at any time be permitted, unless with his client's express consent, to disclose any communication made to him in the course and for the purpose of his employment as such barrister, pleader, attorney or vakíl by or on behalf of his client, or to state the contents or condition of any document with which he has become acquainted in the course and for the purpose of his professional employment, or to disclose any advice given by him to his client in the course and for the purpose of such employment:

Provided that nothing in this section shall protect from disclosure—

(1) Any such communication made in furtherance of any [illegal[1]] purpose;

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[1] 24 Howell's State Trials, 808.

[2] The word in brackets was substituted for "criminal" by Section 10 of the amending Act, XVIII of 1872.

(2) Any fact observed by any barrister, pleader, attorney or vakíl in the course of his employment as such showing that any crime or fraud has been committed since the commencement of his employment.

It is immaterial whether the attention of such barrister, [pleader,[1]] attorney or vakíl was or was not directed to such fact by or on bealf of hish client.

Explanation.—The obligation stated in this section continues after the employment has ceased.

Illustrations.

(*a.*) A, a client, says to B, an attorney,—'I have committed forgery, and I wish you to defend me.'

As the defence of a man known to be guilty is not a criminal purpose, this communication is protected from disclosure.

(*b.*) A, a client, says to B, an attorney,—'I wish to obtain possession of property by the use of a forged deed on which I request you to sue.'

This communication, being made in furtherance of a criminal purpose, is not protected from disclosure.

(*c.*) A, being charged with embezzlement, retains B, an attorney, to defend him. In the course of the proceedings, B observes that an entry has been made in A's account-book charging A with the sum said to have been embezzled, which entry was not in the book at the commencement of his employment.

This being a fact observed by B in the course of his employment showing that a fraud has been committed since the commencement of the proceedings, it is not protected from disclosure.

Reason and Object of the Rule.

[This Section applies when a barrister, attorney, pleader, or vakíl is the party interrogated as a witness: and it will be observed that he is not only privileged but is absolutely protected, from being compelled to disclose, unless with his client's *express* consent. "*Where the professional adviser is the party interrogated,*" says Mr. Taylor, "it is quite immaterial whether the communication relate to

[1] The word in brackets was added by Section 10 of the amending Act, XVIII of 1872.

"any litigation commenced or anticipated; for, as Lord Chancellor "Brougham observed in a case of high authority,[1]—'if the privilege "were confined to communications connected with suits begun or "intended or expected or apprehended, no one could safely adopt such "precautions as might eventually render any proceedings successful "or all proceedings superfluous;' and again,—'This protection is not "qualified by any reference to proceedings pending or in contempla-"tion. If touching matters that come within the ordinary scope of "professional employment, legal advisers receive a communication in "their professional capacity, either from a client or on his account, "and for his benefit in the transaction of his business,—or, which "amounts to the same thing, if they commit to paper, in the course "of their employment on his behalf, matters which they know only "through their professional relation to the client,—they are not only "justified in withholding such matters, but *bound to withhold* them, and "will not be compelled to disclose the information or produce the "papers in any Court of Law or Equity, either as party or as witness. "The foundation of this rule is not on account of any particular im-"portance which the law attributes to the business of legal professors, "or any particular disposition to afford *them* protection. But it is out "of regard to the interests of justice which cannot be upholden, and to "the administration of justice which cannot go on, without the aid of men "skilled in jurisprudence, in the practice of the Courts, and in those "matters affecting rights and obligations, which form the subject of all "judicial proceedings.' If such communications were not protected, no "man, as the same learned Judge remarked in another case,[2] would dare "to consult a professional adviser, with a view to his defence, or to the "enforcement of his rights; and no man could safely come into a "Court, either to obtain redress or to defend himself." (§§ 834, 835.)

The Illustrations should be read in connection with the *proviso*. As to *Illustration* (*c*), see *Brown* v. *Forster*, 1 Hurlstone and Norman's Rep. 736. The substitution of "illegal purpose" for "criminal purpose" in the first portion of the proviso by the amending Act (XVIII of 1872) carries the principle somewhat further than what can be said to be established law in England, but is in conformity with the expressed opinion of several able Judges. In *Russell* v. *Jackson* (9 Hare's Chancery Rep.) Turner, V. C., said.—"I am very much disposed to think that the existence of an *illegal purpose* would prevent any privilege attaching to the communications. Where a solicitor is party to a fraud, no privilege attaches to the communications with him upon the subject, because the contriving of a fraud is no part of his duty as

Object and meaning of the proviso.

[1] *Greenough* v. *Gaskell*, 1 Mylne and Keene's Chancery Rep. 103.

[2] *Bolton* v. *Corporation of Liverpool*, 1 Mylne and Keene's Chancery Rep. 94—95.

solicitor: and I think it can as little be said that it is part of the duty of a solicitor to advise his client as to the means of evading the law." 'In *Follett* v. *Jefferyes* (1 Simon's Chancery Rep. N. S. 17), Rolfe, V. C., observed. "It is not accurate to speak of cases of fraud, contrived by the client and solicitor together, as cases of exception to the general rule. They are cases not coming within the rule itself, for the rule does not apply to *all which passes* between a client and his solicitor, but only to what passes between them in professional confidence; and no Court can permit it to be said that the contriving of a fraud can form part of the professional occupation of an attorney or solicitor."

Can the barrister, attorney, &c., be asked whether the communication was or was not made in furtherance of an illegal purpose? "It seems," says Mr. Taylor, "that the legal adviser *cannot be asked* whether the conference between him and his client was for a lawful or an unlawful purpose; though if, from independent evidence, it should clearly appear that the communication was made by the client for a criminal purpose, as for instance, if the attorney was questioned as to the most skilful mode of effecting a fraud, or committing any other indictable offence, it is submitted that, on the broad principles of penal justice, the attorney would be bound to disclose such guilty project." (§ 833.) Having regard to Section 132, *post*, and to the general tenor of the whole Act, it may be doubtful whether an answer to the question would not be compelled in India.

The above Section only mentions *barristers*, *attorneys*, *pleaders*, *and vakils*. It may be a question how far the privilege will extend to so-called legal practitioners in this country, who do not fall within the above enumeration. That *muhhtars* are not within the rule was decided by the Calcutta High Court under Section 24 of Act II of 1855; and the reasons given for the decision equally apply to the language of the present Section (*The Queen* v. *Chandrakant Chakravartti*, I B. L. R. A. Crim. 8: and see IX W. R Crim. Let. 10). The protection is in England extended to all the necessary organs of communication with the legal adviser, *e. g.* interpreters, intermediate agents, attorney's town or local agent or clerk, foreign counsel, and even to a gentleman sent out to India to act as a solicitor's agent in collecting evidence respecting a pending suit. Some of these are expressly declared to be within the rule in India by Section 127, *post*, Q. V. Medical men, clergymen, clerks, bankers, stewards, and confidential friends, even an attorney friend, when consulted as a *friend* and not as an *attorney*, are, however, not within the rule. But where a person was consulted confidentially under the erroneous impression that he was an attorney, it would seem that the privilege attached.

Who are within the Rule.

Where an attorney, in violation of his duty, communicated the contents of an instrument entrusted to him, this secondary evidence was received after notice to produce the original had been duly given; and it has been several times laid down in England that the mere fact of papers and other subjects of evidence having been *illegally taken* from the possession of the party against whom they are offered, or *otherwise* unlawfully obtained, constitutes no valid objection to their admissibility, provided they be pertinent to the issue. For the Court will not notice whether they were obtained lawfully or unlawfully, nor will it raise an issue to determine that question. Where the same attorney is employed by two parties, the test is,—"was the communication made by the party to the witness in the character of his own *exclusive* attorney?"—If it was, the bond of secrecy is imposed on the attorney called as a witness; if it was not, the communication will not be privileged. If an attorney acting for both parties has an offer made to him by the one for communication to the other, he may be called upon to disclose the nature and terms of this offer at the instance of either party. But if an attorney, acting for one party, by the direction of his client makes a proposal to the opposite party, though he may be compelled to disclose what he stated to that party, he cannot divulge what his own client communicated to him. The protection does not cease with the termination of the suit or business in which the communication was made, nor yet with the death of the client. *The seal of the law remains for ever*, unless removed either by the party himself, or perhaps by his personal representatives after his death. (See the *Explanation* to the Section.) Where, however, the client, who made the communication, is dead, and the litigating parties both claim under him, it would be obviously unjust to determine that the privilege shall belong to the one claimant rather than to the other. Either of them, therefore, can call the attorney as a witness. Other exceptions, which have been recognized by English law, are—where the knowledge was not acquired by the attorney *solely* by his being employed professionally, but was, in some measure, obtained by his *acting as a party*, more especially if the transaction were fraudulent—where the communication was made *before* the attorney was employed as such, or *after* his employment had ceased—where it had no reference to professional employment: and all cases in which the attorney was acting not as such, but in some other character, as, for instance, in that of a subscribing witness. There is also no privilege where *unnecessary communications* have been made by the client. A prosecutor's attorney was allowed to state that his client mentioned to him, that he would give a large sum to have the prisoner hanged. An attorney or other legal adviser may also be called to prove his client's handwriting, or to

Exceptions to the Rule.

identify him as the person who verified a plaint or executed a múkhtarnáma or vakálutnámah; but he cannot be asked whether a document entrusted to him was duly stamped or had an erasure upon it.

"*Unless with his client's express consent.*"—The privilege is that of the client: he may *expressly* waive it, or he may do so by calling the barrister, pleader, attorney, or vakíl as a witness, and questioning him on matters which, but for such question, he would not be at liberty to disclose. But he does not lose the privilege by giving evidence in the suit *at his own instance*, or if he be compelled to give evidence at the instance of another party. It will be observed that the above Section (126) applies *only when the barrister, pleader, attorney, or vakíl is the person interrogated.* Section 129 applies *where the client is interrogated*, and whether such client be *a party to the case* or not. Mr. Taylor remarks that "the rule of protection has not been laid down in equally broad terms, where the *client* himself is the party interrogated. It has, indeed, been established that, *in this event*, all communications between the solicitor and client, whether pending and with reference to litigation, or made before litigation and with reference thereto, or made after the dispute between the parties followed by litigation, though not in contemplation of, or with reference to that litigation, *are protected:* as also are communications made respecting the subject-matter in question, pending or in contemplation of litigation on the same subject with other persons, with the view of asserting the *same* right. If, however, communications pass between a client and solicitor before any dispute has arisen between the client and his opponent, the opponent can compel the client by a bill in equity to disclose these communications, although they relate to matters which form the subject of the suit, except so far as they contain mere legal advice and opinions." (§ 845.) Mr. Taylor goes on to add that the case of *Radcliffe* v. *Fursman*,[1] in which this doctrine was propounded, has been, however, generally disapproved of since; and, referring to Lord Justice Knight Bruce's argument in the case of *Pearse* v. *Pearse*,[2] he adds that, if the view there expressed be correct, it may still be urged with success that if a man, with relation to his own private and exclusive interests merely, upon a point upon which he owes no fiduciary duty to another, lays a statement before counsel for his professional advice, he cannot be compelled afterwards to disclose it, although at the time no suit or dispute was in existence. (§ 847.) The following language of Lord Brougham in the case of *Greenough* v. *Gaskell*[3] may also be borne in mind:—"We

Privilege of Client.

[1] 2 Brown's Parliamentary Cases, 514.

[2] DeGex and Smale's Chancery Rep., 18—31.

[3] 1 Mylne and Keene's Chancery Rep., 103.

are here to consider not the case which has frequently arisen in Courts of Equity, and more than once since I came into this Court, of a party called upon to produce his own communications with his professional advisers. How far he may be compelled to do so has, at different times, been a matter of controversy; and in two cases before Lord Lyndhurst, and one since I sat here, the principle has been acted upon, that even the party himself cannot be compelled to disclose his own statements made to his counsel or solicitor in the suit pending, or with reference to that suit when in contemplation. But the party has no *general* privilege or protection: he is bound to disclose all he knows and believes and thinks respecting his own case; and the authorities therefore are, that he must disclose also the cases he had laid before counsel for their opinion, *unconnected with the suit itself* . . . . . To compel a party himself to answer upon oath, even as to his belief or his thoughts, is one thing; nay, to compel him to disclose what he has written or spoken to others, *not being his professional advisers*, is competent to the party seeking the discovery; for such communications are not necessary to the conduct of judicial business, and the defence or prosecution of men's rights by the aid of skilful persons. *To force from the party himself the production of communications made by him to professional men seems inconsistent with the possibility of an ignorant man safely resorting to professional advice, and can only be justified if the authority of decided cases warrants it.* But no authority sanctions the much wider violation of professional confidence, and in circumstances wholly different, which would be involved in compelling counsel or attorneys or solicitors to disclose matters committed to them in their professional capacity, and which but for their employment as professional men, they would not have became possessed of." The question how far a client, whether a party to the case or not, can be compelled, when examined as a witness, to disclose communications which have taken place between him and professional men, has not been settled exhaustively in England, as will appear from the authorities just referred to. Section 129, *post*, lays down a definite rule for India, which is in accordance with the principles advocated by those who have most carefully and ably discussed the question. It enacts that the client shall not be compelled to disclose any confidential communication which has taken place between him and his legal professional adviser, *unless he offers himself as a witness*, and even then he can be compelled to disclose such communications only as may appear to the Court necessary to be known in order to explain any evidence which he has given, but no others. If he do not offer himself as a witness, if he be summoned in the usual way without his offering himself, his privilege is absolute.

See, in connection with this Section, the *Explanation* to Section 23, *ante*, page 101.]

Section 126 to apply to interpreters, &c.

127. The provisions of section one hundred and twenty-six shall apply to interpreters, and the clerks or servants of barristers, pleaders, attorneys and vakíls.

[See *ante*, page 437. The extension of the protection to interpreters is particularly important in a country like India in which there are so many races speaking different languages: and in which the most important portion of the administration of justice is conducted in a foreign language.]

Privilege not waived by volunteering evidence.

128. If any party to a suit gives evidence therein at his own instance or otherwise, he shall not be deemed to have consented thereby to such disclosure as is mentioned in section one hundred and twenty-six; and if any party to a suit or proceeding calls any such barrister [pleader[1]], attorney or vakíl as a witness, he shall be deemed to have consented to such disclosure only if he questions such barrister, attorney, or vakíl on matters which, but for such question, he would not be at liberty to disclose.

[The client does not "waive his privilege," says Mr. Taylor, "by calling the attorney as a witness, unless he also examines him in chief to the matter privileged; and, even in that case, it has been held in Ireland that the cross-examination must be confined to the point upon which the witness has been examined in chief."[2] (§ 849.) Section 128 restores the rule followed in England, contrary to which Section 24 of Act II of 1855 had enacted that, if a party to a suit gave evidence therein at his own instance, he should be deemed thereby to have waived his privilege, and to have consented to the disclosure by the barrister, attorney, or vakíl of any matter which might be relevant.

With reference to the words "*if any party to a suit or proceeding calls any such barrister, &c.*," it may be observed that there was not under the old law, and is not under the new Act, anything to prevent an attorney or other professional person who has acted as advocate for

[1] The word in brackets was added by Section 10 of the amending Act, XVIII of 1872.

[2] On this point see Section 138, *post*, and the note thereto.

either of the parties to a suit and has pleaded the case in Court, from being examined as a witness in the same case (*Ramfal Shaw* v. *Biswanath Mandal and others*, V B. L. R. Appen. 28 : and see *Cobbett* v. *Hudson*, 1 Ellis and Blackburn's Rep. Q. B. 11, there referred to.]

Confidential communication with legal advisers.

129. No one shall be compelled to disclose to the Court any confidential communication which has taken place between him and his legal professional adviser, unless he offers himself as a witness, in which case he may be compelled to disclose any such communications as may appear to the Court necessary to be known in order to explain any evidence which he has given, but no others.

[The subject of this Section has already been discussed, *ante*, page 439. It may further be observed that, although no one can be *compelled* to disclose, &c., there is nothing to prevent him from disclosing, if he have no objection to do so. Again, "*any confidential communication which has taken place between him and his legal professional adviser*," will include as well the statements made by the client as the advice given by the professional adviser. Whether "*legal professional adviser*" is synonomous with "*barrister, pleader, attorney, or vakil*, used in the preceding Sections, or was intended to include other persons, *e. g. mukhtars*, may be a question to be decided hereafter.]

Production of witness' title-deeds.

130. No witness who is not a party to a suit shall be compelled to produce his title-deeds to any property, or any document in virtue of which he holds any property as pledgee or mortgagee, or any document the production of which might tend to criminate him, unless he has agreed in writing to produce them with the person seeking the production of such deeds or some person through whom he claims.

Production of documents which another person, having possession, would be entitled to refuse to produce.

131. No one shall be compelled to produce documents in his possession, which any other person would be entitled to refuse to produce if they were in his possession, unless such last mentioned person consents to their production.

[These two Sections may be considered together, Section 131 extending to the agent the same protection which Section 130 creates for the principal. It will be evident from the words "*No witness who is not a party to a suit*," that the privilege created by Section 130 extends only to *witnesses who are not parties to the suit in which they are called*; and all such persons are absolutely privileged from being compelled to produce their title-deeds, &c., unless there be a written agreement for their production between them and the person seeking such production. The principle so enacted is in accordance with the rule of English law. "Upon principles of reason and equity," says Mr. Taylor, "Judges will refuse to compel a witness to produce either his title-deeds, or any document the production of which may tend to criminate him, or any document which he holds as mortgagee or pledgee (§ 428). The fact that the production of a document will expose the person producing it to a *civil action* affords no ground for protection in England according to the latest decided cases;[1] and the same rule has evidently been adopted by the framers of the Indian Evidence Act, seeing that the above Section does not extend the principle of protection to such cases.

Privilege belongs only to witnesses other than parties.

In England the same rule, which protects title-deeds from production, protects also the party justified in refusing to produce them from being compelled to disclose their contents. "It would be perfectly illusory," said Mr. Baron Alderson,[2] "for the law to say that a party is justified in not producing a deed, but that he is compellable to give parol evidence of its contents; that would give him, or rather his client through him, merely an illusory protection, if he happens to know the contents of the deed, and would be only a round-about way of getting from every man an opportunity of knowing the defects there may be in the deeds and titles of his estate." The same reasoning and the same rule will no doubt be followed in India. Where a barrister, pleader, attorney, or vakíl is the person in possession of the document, he is expressly prohibited by Section 126, *ante*, page 434, to state the contents. As to the owner of the document and other agents, the Act contains no express provision. There will, of course, be nothing to prevent other secondary evidence of the contents of the document being given in such cases.

Can witness be compelled to give parol evidence of contents?

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[1] *Doe* v. *Date*, 3 Adolphus and Ellis' Rep. 609: *Doe* v. *Lord Egremont*, 2 Moody and Robinson's Rep. 386.

[2] In *Davies* v. *Waters*, 9 Meeson and Welsby's Rep. 612.

Section 131 will extend not only to professional men but to trustees, mortgagees and agents. Having regard to the word "compelled" in this Section, it will appear that these persons will be *allowed* to produce documents which other persons would be entitled to refuse to produce, if they were in their possession. This also is in accordance with English law.[1] It follows that although a barrister, pleader, attorney, or vakil is forbidden (by Section 126) to state the contents of any document with which he has become acquainted in the course and for the purpose of his professional employment, he will be permitted to produce the document itself, if it happen to be in his possession and he chose to do so.

Agents not prohibited from producing.

See, in connection with this Section, paragraph 3 of Section 165, *post*, and also Section 162, *post*.

With respect to *witnesses who are parties to the suit*, Section 22 of the repealed Act, II of 1855, enacted that "a witness being a party to the suit shall not be bound to produce any document in his possession or power, *which is not relevant or material to the case of the party requiring its production*." This provision, though not expressly re-enacted, is, however, in entire conformity with the requirements of the whole Evidence Act. A case must be tried and decided *secundum allegata et probata* (see *ante*, page 262 and following pages), and where the plaintiff sought to force the defendant to produce a document or title-deed not *relevant or material* to his own case, the defendant could properly resist the production on the ground of *irrelevancy*. If this principle be properly applied, the plaintiff, who must succeed on the strength of his own title, not on the weakness of the defendant's, will be prevented from using the law to detect flaws in the title of the latter. Where the defendant is in possession of a document or title-deed material or relevant to the case of the plaintiff, there can be no doubt that there is no protection, and that production will be compelled: and it is impossible to gainsay the justice of this rule. Suppose, for example, that the plaintiff claimed a bequest of Rs. 10,000 under a will in possession of the defendant, who by the same will took the whole of the immovable property, would it be equitable to allow the latter to refuse to produce the will, because by doing so he might run the risk of disclosing some flaw in his title to the immovable property? If he denied the bequest and were himself the residuary legatee, what a temptation there would be to imagine such a danger! It is possible that the risk arising from the discovery of flaws has been somewhat exaggerated, seeing that a flaw in the defendant's title will

Can witnesses being parties be compelled to produce their title-deeds?

[1] *Hibberd* v. *Knight*, 2 Welsby, Hurlestone, and Gordon's Rep. 11.

not, in the great majority of cases, advance or improve the title of the plaintiff, who can only succeed on making out such a *primâ facie* title as shall put his adversary to the necessity of proving a better title in himself. It may further be observed that the law of real property in India wholly differs from that in England: and that titles are in the former country very unlikely to be destroyed by the discovery of accidental flaws.]

Witness not excused from answering on ground that answer will criminate.

132. A witness shall not be excused from answering any question as to any matter relevant to the matter in issue in any suit or in any civil or criminal proceeding, upon the ground that the answer to such question will criminate, or may tend, directly or indirectly, to criminate such witness, or that it will expose, or tend, directly or indirectly, to expose such witness to a penalty or forfeiture of any kind:

Proviso.

Provided that no such answer, which a witness shall be compelled to give, shall subject him to any arrest or prosecution, or be proved against him in any criminal proceeding, except a prosecution for giving false evidence by such answer.

Rule of English law different.

[The provisions of this Section are not in accordance with English law, under which a witness is excused from replying to any question, the answer to which would have a tendency to expose such witness or the husband or wife of such witness to any kind of criminal charge or to a penalty or forfeiture of any nature whatsoever—a rule which was respected even by Chief Justice Jefferies when it told *against* the prisoner.[1] In Ireland, it has even been decided that, upon a trial for the murder of a person killed in a duel, any person who was present and in any way countenanced the proceeding, might refuse to answer any question relating thereto. Under the New York Civil Code,[2] the protection has been restricted to those questions the answers to which would have a tendency to subject to the punishment of *felony*. In England the Legislature has occasionally found it necessary to take away the privilege, or by an act of indemnity to leave no cause for its

[1] Taylor, § 1308. [2] § 1854.

exercise. The Act relating to combinations by Workmen,[1] the Larceny Act, 1861,[2] and the Acts for enquiring into corrupt practices at Elections are examples (and see Section 37 of the Madras Police Act, VIII (M. C.) of 1867, which indemnifies witnesses on prosecutions for gaming). But these Statutes differ from the Indian enactment in this, that, under their provisions, the having given evidence is a complete bar to a subsequent prosecution: while the Indian Act does not forbid such a subsequent prosecution, but merely provides that the witness's answer is not to be the means of subjecting him thereto and cannot be used against him. It is clear that it might, however, attract suspicion where none attached before, and so lead to the discovery of *other* evidence sufficient to lead to a conviction. Against this, however, may be put the fact that if a witness in England do answer such questions, his replies can be used against him, unless at the time, having claimed the protection of the Court, he was illegally compelled to answer.

Whether a witness can be compelled to answer a question, the reply to which would *subject him to a civil action or pecuniary loss, or charge him with a debt*, is a question on which the above section is silent. It was discussed in England in Lord Melville's case[3] and decided in the affirmative by a majority consisting of eight out of twelve Judges. To remove all doubts, however, a Statute was subsequently passed (46 Geo. III, Cap. 37) which declared a witness bound to answer such questions if *relevant to the matter in issue*. The New York Civil Code contains a similar provision. In India there can be no reasonable doubt that this principle should be followed; for, if a man is not protected from answering questions which may subject him to a criminal prosecution, much less should he be protected where the resulting inconvenience and injury are less in degree. It may, however, be regretted that such cases have not been specifically provided for in the new enactment.[4]

Question must be relevant.

It will be observed that the witness will be compelled to answer only when the question relates to "*matter relevant to the matter in issue*." This accords in some respect with a suggestion made in England,[5] and mentioned by Mr. Taylor, that, where the question is material to the issue, it should be left to the discretion of the Judge whether or not he will enforce an answer, having due regard to the general interests

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[1] 6 Geo. IV, Cap. 129, Section 6.

[2] 24 & 25 Vict., Cap. 96, Sections 75—84.

[3] 6 Parliamentary Debates, 167—245.

[4] The above Section (132) is almost verbatim the same as Section 32 of the repealed Act, II of 1855, which also was silent on this point.

[5] Law Review, No. XIII, pp. 28—30.

of justice; provided always that if an answer be enforced, it should either have the effect of indemnifying the witness from any punishment, penalty, or forfeiture, with respect to the subject to which the answer relates; or, at least, such answer should not be admissible evidence in any future criminal proceedings instituted against the witness The Indian Evidence Act, although it gives the Judge no discretion as to the answer being compulsory where the matter is material, confers such a discretion upon him when the question relates to a matter not relevant except as affecting the credit of the witness (see Section 148, *post*). In the former case, where the answer is compulsory, it enacts that such answer shall not subject the witness to any arrest or prosecution, or be proved against him in any criminal proceeding, *except a prosecution for giving false evidence by such answer*. The latter words create a very proper exception and are more accurate than the language of the old Section 32 of Act II of 1855, "except for the purpose of punishing such person for wilfully giving false evidence *upon such examination*."

It has been held in England that a Judge is not bound to warn a witness of his privilege to refuse to answer criminating questions; nor will counsel be permitted to object to such questions, if the witness himself do not refuse to answer. In dealing with native witnesses in India, it will occasionally be useful to make them understand that their answers cannot be used against them except on a charge of giving false evidence. Where the usual inducements to speak the truth are weak, the addition of any apprehension as to the consequences of speaking it inevitably leads to falsehood, which result may occasionally be obviated by removing the cause of such apprehension.

Two exceptions.

It may be observed that witnesses examined by Police officers investigating cases, which they are by law empowered to investigate, are not bound to answer criminating questions put by such officers (see Sections 118, 119, and 134 of the Code of Criminal Procedure, Act X of 1872). Collectors engaged in settlement operations and other proceedings are by Clause 1, Section 19 of Regulation VII of 1822, authorized to summon all *sádr malguzárs* and other persons owning, occupying, managing, or cultivating lands within or in the vicinity of the *mehal* to which their inquiries extend, and to require the production of their accounts and to examine such persons as to the truth of such accounts, provided however that no person shall be compelled to answer any interrogation regarding matters wherein he may have an immediate personal interest in concealing the truth, or in uttering what is false, not being an interest arising out of fear, favor, or reward, or any corrupt bargain or agreement with another party. These provisions are still in force and are saved by Section 2, *ante*, page 72. As to *criminating documents*, see Section 130, *ante*, page 442.]

133. An accomplice shall be a competent witness against an accused person; and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice.

Accomplice.

[Mr. Taylor, speaking of *accomplices*, "who are usually interested, and always infamous witnesses, and whose testimony is admitted from necessity,[1] it being often impossible without having recourse to such evidence, to bring the principal offenders to justice," thus explains the law on this subject:—

State of English law as to accomplices.

"The *degree* of credit, which ought to be given to the testimony of an accomplice, is a matter exclusively within the province of the jury. It has sometimes been said that they ought not to believe him, unless his testimony is corroborated by other evidence; and, without doubt, great caution in weighing such testimony is dictated by prudence and reason. *But no positive rule of law exists on the subject;* and the jury may, if they please, act upon the evidence of an accomplice, even in a capital case, without any confirmation of his statement. It is true that Judges, in their discretion, generally advise a jury not to convict a prisoner upon the testimony of an accomplice alone; and, although the adoption of this practice will not be enforced by a Court of Review, its omission will, in most cases, be deemed a neglect of duty on the part of the Judge. Considering, too, the respect which is always paid by the jury to such advice from the bench, it may be regarded as the settled course of practice not to convict a prisoner, except under very special circumstances, upon the uncorroborated testimony of an accomplice. The Judges do not in such cases withdraw the case from the jury by positive directions to acquit, but they only advise them not to give

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[1] It may, however, be observed that the objections which may be made against the reliability of the testimony of accomplices do not apply with similar force to all *accomplices*. Mr. Taylor, in a subsequent paragraph, says; "One class of persons, *apparently accomplices*, may here be named, to whom the rule requiring corroborative evidence does not apply, namely, persons who have entered into communication with conspirators, but who, in consequence of either a subsequent repentance, or an original determination to frustrate the enterprize, have disclosed the conspiracy to the public authorities, under whose direction they continue to act with their guilty confederates, till the matter can be so far matured as to insure their conviction. *The early disclosure is considered as binding the party to his duty;* and though a great degree of disfavor may attach to him for the part he has acted as an *informer*, or on other accounts, yet his case is not treated as that of an accomplice." (§ 891.)

credit to the testimony." Mr. Roscoe says:[1]—"The law remains in that anomalous state in which the bare existence of a principle is acknowledged, but which principle is constantly disapproved of and frequently violated. As the law now stands, it is universally agreed by all the authorities that, if the accomplice were uncorroborated, a Judge would be wrong who did not advise the jury not to convict; whereas the Court of Criminal Appeal would be bound to pronounce an opinion that a Judge who did not so advise them was right."

Law in India.

The law on this point in India was fully discussed by the Calcutta High Court in the Full Bench Case of *The Queen* v. *Elahi Baksh, appellant*, 29th May, 1866 (V W. R. Crim. Rul. 80). *Peacock, C. J.* (*Kemp and Phear, JJ., concurring*) said—"I am of opinion that a conviction upon the uncorroborated testimony of an accomplice is legal. This is not new law, nor founded upon a new principle. The point was decided in England as far back as the 10th December, 1662, after conference with all the Judges." After an able review of the English cases, the learned Chief Justice proceeds:—"The law of England, therefore, upon this subject is beyond doubt. The law of America is the same, and in that country, where, in most of the States, new trials are granted in criminal cases, new trials have been refused even when the verdicts were obtained upon the uncorroborated evidence of an accomplice. The cases upon the subject are collected in Wharton's Criminal Law of the United States of America, p. 366. It does not appear that in the cases in which new trials were refused, the Judge who tried the case had omitted to make such observations to the jury, with reference to the evidence of the accomplices, as the circumstances required. But in civil cases it is clear that both in that country and in England, a new trial will be granted where from the absence of proper instructions from the Judge, the jury fall into error. . . . . It was contended in the course of argument in the present case, that in India the rule of evidence in the Mofussil is different from the law of England, with respect to the legality of convicting upon the uncorroborated evidence of an accomplice. If there had been a long uniform course of decisions in the late Sádr Court, that the uncorroborated evidence of an accomplice was insufficient in law for the conviction of a prisoner, we should have been disposed to bow to those decisions and to act upon the rule '*Stare decisis*.' One case only was cited in which a Judge of the Sádr Court stated that he did not think it legal to convict upon such evidence. There may be other cases to the same effect. But there is no uniform current of decisions, which would justify us in holding that the

7, Nizamut Reports, p. 57.

[1] Digest of the Law of Evidence in Criminal Cases, 6th Ed., p. 122.

law in this respect in the Mofussil was different from the established law of England, and from that which was administered in the late Supreme Court, and is now administered by this Court in the exercise of Original Criminal Jurisdiction. It would require a uniform train of decisions to justify us in holding that the Law of Evidence to be administered by the Court upon such a point as this, is different in the exercise of the Appellate Criminal Jurisdiction from that which is acted upon in the exercise of Original Jurisdiction.

When called upon to give effect to particular expressions, which have been used by the Judges of the late Sádr Court with regard to the rules of evidence, we must bear in mind, that up to a very recent period, when trial by jury was established in certain districts, it was the province of the Sessions Judges and of the Judges of the late Sádr Court to determine questions of fact, as well as questions of law, in criminal cases; and that, in dealing with such cases, it was not very frequently necessary to determine whether the evidence of a particular witness was insufficient in law to justify a conviction or merely insufficient to induce them, as Judges of fact, to declare that a prisoner was guilty. *There is a wide distinction, however, between disbelieving evidence, and determining that it is not legally sufficient if believed:* but this distinction is not always sufficiently adverted to by Courts, which are judges of fact as well as of law."

The Chief Justice then proceeds to consider the question, whether the omission of the Judge to advise the jury as to the amount of credit, which ought to be given to the testimony of an accomplice, was such an error in law as to furnish a valid ground of appeal. After a learned review of the authorities in English and Scotch law, he continues:—"It is quite as necessary here as it is in England, if not more so, that the evidence of accomplices should not be left to a jury without such directions and observations from the Judge as the circumstances of the case may require. The question is, whether the omission of the presiding Judge on a trial in the Mofussil, to make such observations is not such an error in his summing up as to justify the Court on appeal or revision in setting aside a verdict of guilty. . . . . By Section 379[1] of the Code of Criminal Procedure, it is enacted that, in a trial by jury, the Judge shall sum up the evidence on both sides, and the jury shall then deliver their finding upon the charge, and 'a statement of the Judge's direction to the jury shall form part of the record.' There can be no doubt that *that* Section requires the Judge to sum up properly, and that there would be very great danger in holding that there is no remedy by appeal against a verdict of 'guilty,' if it appears clearly to the High Court *that a failure of*

[1] *I. e.* of the *old* Code, Act XXV of 1861. The new Code, however, makes no difference on these points.

justice has been caused by improper advice upon a question of fact, or by an omission to give that advice which a Judge, in the exercise of a sound judicial discretion, ought to give upon questions of fact, or as to the degree of credit to be given to particular witnesses.

"It appears to me that it amounts to an error of law in the summing up, which on appeal is a ground for setting aside the verdict, subject, however, to the limitation provided by the Code of Criminal Procedure in Sections 439 and 426,[1] *viz.*, that the Appellate Court is satisfied that the accused person has been *prejudiced* by the error or defect, and that a failure of justice has been occasioned thereby."

The whole of this judgment is well worthy of careful perusal. The state of the law as settled thereby was as follows:—A conviction upon the uncorroborated evidence of one or more accomplice or accomplices alone is valid in law; but the Judge in summing up should advise the jury as to the danger of convicting a prisoner on such evidence merely. If he omit to do so, and if moreover the Appellate Court is satisfied that the prisoner was prejudiced by such omission, there will be error in law sufficient to have as its result the setting aside of the verdict. Having regard to what has been quoted at page 393, *ante*, it may be a question whether the Evidence Act has in any way altered the law as settled by the above case. Reading together Section 114 and Illustration (*b*) thereto (*ante*, page 386), the Court may consider, though it is not bound to consider, an accomplice unworthy of credit, unless he is corroborated in material particulars. Having regard to the definition of the word "Court" in Section 3 of the Evidence Act, to the definition of "Criminal Court" in Section 4 of the Code of Criminal Procedure, and to the use of the word "Court" throughout Chapter XIX of the same Code, it is clear that "Court" does not include the jury. The result may be that it is optional with the Judge to presume or not to presume an accomplice unworthy of credit in any particular case: and, if he do not think proper to raise such a presumption, he is not bound to suggest it to the jury. At any rate, whether he suggest it or not, the Section enacts absolutely that *a conviction is not illegal because it proceeds upon the uncorroborated testimony of an accomplice.*

Does the Indian Evidence Act alter the law?

The second portion of Illustration (*b*) to Section 114 (see *ante*, page 388) was put as follows by Peacock, C. J., in the case of *The Queen* v. *Elahi Buksh* (V W. R. Crim. Rul. 84):—"If two or three persons should be apprehended at different places, at long distances from each other, and should each confess and give a similar account as to the persons associated with them in a particular dacoity, the statement of each, if made under such circumstances as not to raise a presumption

[1] *I. e.* of the *old* Code, Act XXV of 1861. The new Code, however, makes no difference on these points.

of collusion might be proved in corroboration of his evidence under Act II of 1855, Section 31.[1] The evidence of the several accomplices so corroborated might be sufficient to satisfy a jury, although the evidence of any one of them alone could not have been safely acted upon." As to corroboration, see also *The Queen* v. *Khotab Sheikh and others*, VI W. R. Crim. Rul. 17: *The Queen* v. *Dwarka*, V W. R. Crim. Rul. 18: *The Queen* v. *Chutterdhari Singh and others*, *id.* 60: *The Queen* v. *Shamshere Beg*, IX W. R. Crim. Rul. 51: *The Queen* v. *Nawab Jan and others*, VIII W. R. Crim. Rul. 19: and *The Queen* v. *Mohima Chundra Dass and others*, VI B. L. R. Appen. 108, which cases may now be usefully consulted in considering the *weight* which should be attached to particular kinds of corroboration. The whole of the facts described by an accomplice may be perfectly true, his very description of them may bear the impress of truth: and yet the accused may be substituted for another actor in the scene. Hence Lord Abinger said,[2] that, in his opinion, the corroboration ought to consist in some circumstances that *affects the identity of the accused person.*]

Number of witnesses.

134. No particular number of witnesses shall in any case be required for the proof of any fact.

[The effect of this Section will be that the evidence of a single witness will be sufficient for proof of any fact, if the Court or the jury believe him. It will be useful to mention the cases in which, under the old rule, something more was required than the uncorroborated evidence of a single witness. The change in the law made by the above Section will thus be more clearly understood. Moreover, these cases must still have their use in assisting the judgment to decide the weight to be allowed to evidence under peculiar circumstances. And first as to *Treason*—

Cases in which English Law required more than the evidence of a single witness—Treason.

The rule of English Statute Law in regard to treason[3] and misprision of treason is, that no person shall be indicted, tried, or attainted thereof, but upon the oaths and testimony of two lawful witnesses, either both to the same

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[1] See now Section 157, *post.*

[2] In *R.* v. *Farler*, 8 Carrington and Payne's Nisi Prius Reports, 107.

[3] Section 28 of the repealed Act, II of 1855, recognized the English Law on the above subjects—It was as follows:—

Except in cases of treason, the *direct* evidence of one witness, *who is entitled to full credit*, shall be sufficient for proof of any fact in any such Court or before any such person. But this provision shall not affect any rule or practice of any Court that requires corroborative evidence in support of the testimony of an accomplice, or of a single witness in the case of perjury.

Evidence of one witness sufficient proof.

Proviso.

overt act, or one to one and the other to another overt act of the same treason, unless the accused shall openly without violence confess the same: and further that, if two or more distinct treasons of divers heads or kinds shall be alleged in one indictment, one witness produced to prove one of these treasons, and another, another, shall not be deemed to be two witnesses to the same treason. "This protective rule," says Mr. Taylor, "which in England has remained in its present state since the days of King William III, and in Ireland was adopted in the year 1821, has been incorporated with some slight variation into the constitution of America, and may be met with in the Statutes of most if not all of the States of the Union." Any *collateral* matter, not conducing to the proof of the overt acts of treason, may be proved by a single witness, or by any other evidence admissible at Common Law, *e. g.*, that the prisoner is a subject of the British Crown. The rule of the Statute Law, which requires two witnesses in a case of treason, does not in England apply to those treasons, which consist in compassing or imagining the death or destruction, or any bodily harm tending to the death or destruction, maiming or wounding of the Queen, where the overt act or acts alleged shall be the assassination of Her Majesty, or any attempt to injure in any manner whatsoever her royal person; or to the misprisions of any such treason; but in all these cases the accused shall be indicted, arraigned, tried, and attainted, in the same manner and according to the same course and order of trial, and upon the like evidence as if he stood charged with murder. (See 39 & 40 Geo. III, Cap. 93;—1 & 2 Geo. IV, Cap. 24;—5 & 6 Vict., Cap. 51). The offence of "*Treason*" is unknown in the phraseology of Indian Law. Offences somewhat analogous are provided for by Chapter VI of the Indian Penal Code.

Perjury.

In cases of *Perjury*, two witnesses were formerly held necessary. But this rule is not now law, though something more than the evidence of a single opposing witness is required; for otherwise there would be only oath against oath and nothing to turn the scale. The single witness must be corroborated by material and independent circumstances. "But," says Mr. Taylor, "it is not precisely accurate to say that the corroborative circumstances must be tantamount to another witness; for they need not be such as that proof of them, standing alone, would justify a conviction in a case where the testimony of a single witness would suffice for that purpose. Thus a letter written by a defendant, contradicting his statement on oath, will render it unnecessary to call a second witness. Still evidence, confirmatory of the single accusing witness in some slight particulars only, will not be sufficient to warrant a conviction: but it must at least be strongly corroborative of his testimony: or to use the quaint but energetic language of Chief Justice Parker, 'a strong and

clear evidence and more numerous than the evidence given for the defendant.' " Without any witness directly to disprove what is sworn, circumstances alone, when they exist in a documentary shape, may be sufficient for conviction without further proof. This rule of English Law has been followed in India. The most important decision on the subject is that of a Full Bench of the Calcutta High Court in the case of *The Queen* v. *Lal Chand Kaurah, Chaukidár, and others* (V W. R. Crim. Rul. 23: and I Jur. N. S. 83): In this case Peacock, C. J., said:—

"According to the law, as administered in the exercise of Original Criminal Jurisdiction, the evidence of only one witness uncorroborated is not sufficient to convict for perjury, because it is governed by the rules of the Law of England. I do not mean to say that every rule of the law of evidence, as administered in England, applies to the Mofussil. But I cannot think that we ought to put such a construction upon Section 28, Act II of 1855,[1] as would allow a person to be convicted of perjury at Alipore or in other parts of the Mofussil, upon the uncorroborated testimony of a single witness, when such evidence would be insufficient for a conviction in Calcutta before the High Court in the exercise of its Original Criminal Jurisdiction. Such a construction would not be very consistent. But if the law is so, we are bound by it. If there was any rule or practice in the Sádr Court or in the Courts in the Mofussil which, before Act II of 1855, prevented a conviction for perjury upon the evidence of a single witness without any corroboration, it appears to me that such Courts fall within the proviso in Section 28. Now, there is a case which was decided by Mr. Samuells in the Sádr Court (see Nizámut Reports, Vol. IX, p. 212, *Government* v. *Goríb Peada*), in which the rule was laid down as follows:—'Perjury is not to be assumed because the story of one man 'appears more credible than that of another. There must be certain 'proof adduced, independent of the oath of one of the parties, that 'the deposition of the other is false.' That is to say, the oath of one man is not sufficient to convict another of perjury, when he has sworn to the contrary; that you are not to take the evidence which by an accident is the more credible for the purpose of convicting of perjury, but you must bring something corroborative, or something more than the evidence of one witness. The rule, which was laid down by the Sádr Court in this case, is supported by other cases, and is in accordance with the principle of the English Law. Indeed, I think, I may safely say that it was the practice of the Sádr Nizámut and of the Mofussil Courts not to allow a conviction for perjury upon the uncorroborated evidence of a single witness: consequently the case does not

[1] See *ante*, page 452, note.

fall within the general rule of Section 28, inasmuch as it is taken out of that rule by the provision, which says that the rule is not to affect any rule or practice of any Court that requires corroborative evidence of a single witness in case of perjury." In the case of *The Queen* v. *Bukhori Chaubi* (V W. R. Crim. Rul. 98), the accused was charged with giving false evidence by denying that he had verified or presented a certain written statement, and it was held that the corroboration, derived from a comparison of signatures, was sufficient to sustain a conviction.

Case of two contradictory statements.

"If the evidence adduced in proof of the crime of perjury consists," says Mr. Taylor, "of *two opposing statements by the prisoner* and nothing more, he cannot be convicted. For, if one only was delivered under oath, it must be presumed from the solemnity of the sanction that the declaration was the truth, and the other an error or falsehood; though the latter, being inconsistent with what he has sworn, may form important evidence *with other circumstances* against him; and, *if both the contradictory statements were delivered under oath*, there is still nothing to show which of them is false, when no other evidence of the falsity is given. If indeed it can be shown that before making the statement upon which perjury is assigned, the accused had been *tampered* with, or if any other circumstances tend to prove that the statement offered as evidence against the prisoner was true, a legal conviction may be obtained; and provided the nature of the statements was such that one of them must have been false to the *prisoner's knowledge*, slight corroborative evidence would probably be deemed sufficient. But it does not necessarily follow that, because a man has given contradictory accounts of a transaction on two occasions, he has thereby committed perjury. For cases may well be conceived in which a person might very honestly swear to a particular fact from the best of his recollection and belief, and might afterwards from other circumstances be convinced that he was wrong, and swear to the reverse without meaning to swear falsely either time." The latter portion of the above quotation consists of the remarks of *Holroyd J.* in *R.* v. *Jackson*,[1] and may well be borne in mind in India where the law on the subject of contradictory statements is not the same as in England. The Calcutta High Court have decided by a majority of three Judges to two, that where no evidence for the prosecution was offered, corroborative of either statement, and the giving intentionally of false evidence was charged on two contradictory depositions made, the one before the committing Magistrate and the other before the Sessions Judge, a finding in the alternative is sufficient to maintain a conviction for

[1] Lewin's Crown Cases on the Northern Circuit, 270.

giving false evidence. (*The Queen* v. *Mussamut Zamirun*, VI W. R. Crim. Rul. 65.) The learned Chief Justice (Peacock) thus delivered the opinion of the majority of the Court: "I have no doubt that there may be an alternative finding, as well in a case in which the evidence proves the commission of one of two offences falling within the same Section of the Penal Code and it is doubtful which of such offences has been proved, as in one in which the evidence proves the commission of an offence falling within one of two Sections of the Penal Code, and it is doubtful which of such Sections is applicable. This appears to me to be quite clear when Section 381[1] of the Code of Criminal Procedure is read together with Section 242,[2] and Clause 5, Section 382 of that Code. A swears before the Magistrate that he saw the prisoner kill B. The prisoner is committed to the Sessions for trial for murder. A on the trial swears that he did *not* see the prisoner kill B, and the prisoner is acquitted: A is in consequence committed for trial for giving false evidence, and two charges are framed against him under Section 242,[2] Code of Criminal Procedure. 1*st*,—That he intentionally gave false evidence before the Magistrate by swearing that he saw the prisoner kill B. 2*nd*,—That he intentionally gave false evidence before the Sessions Judge by swearing that he did *not* see the prisoner kill B. The Sessions Judge finds that the prisoner intentionally gave false evidence, but that it is doubtful whether the statement made before the Magistrate or that made before the Sessions Judge was the false one. If the prisoner was innocent, and the statement before the Magistrate was false, the prisoner has in consequence been improperly committed for trial on a charge of murder, and has suffered all the degradation, annoyance, and anxiety of being committed on a false charge. If the prisoner was guilty, and the witness in consequence of bribery or other

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[1] 381. When the trial in any criminal Court is concluded, the Court, in passing judgment, if the accused person be convicted, shall distinctly specify the offence of which, and the Section of the Indian Penal Code under which he is convicted, or if it be doubtful under which of two Sections the offence falls, shall distinctly express the same, and pass judgment in the alternative, according to Section 72 of the said Code. (See the corresponding Section (461) of the *new Code*, Act X of 1872.)

What the judgment is to specify.

[2] 242. When it appears to the Magistrate that the facts which can be established in evidence show a case falling within some one of two or more Sections of the Indian Penal Code, but it is doubtful which of such Sections will be applicable, or show the commission of one of two or more offences falling within the same Section of the said Code, but it is doubtful which of such offences will be proved, the charge shall contain two or more heads framed respectively under each of such Sections, or charging respectively each of such offences accordingly. (See Section 455 and the specimen charge for an offence under Section 193 of the Penal Code in Part II, Schedule III of the *new Code*, Act X of 1872.)

cause has sworn falsely before the Sessions Judge, the administration of justice has been defeated, and a murderer has been acquitted. It is clear that unless the law is very defective, or we are to trifle with the administration of justice, A ought to be punished. It appears to me that the law is not deficient, and that the case is provided for by the Code of Criminal Procedure, whether it be read according to the strict letter or according to its spirit. In such a case it would seem clear that the Magistrate was right in framing a charge containing two heads under Section 242. The Sessions Judge would also be strictly within the letter, as well as the spirit of Sections 381 and 382 (Clause 5), in finding that A is guilty of the offence of intentionally giving false evidence, and that he is guilty *either* of the offence specified in the first head, *or* of the offence specified in the second head of the charge." It may again be remarked here that the study of the Law of Evidence is greatly assisted by a knowledge of the principles of logic. If the "*opposition*" between the two statements or propositions upon which perjury was assigned were that known by logicians as *contradiction*, one of them *must* be false; if they were *contraries*, both *might* be false, but both could not be true; if they were *subcontraries*, both statements *might* be true, and a conviction in the alternative *could*, therefore, be wrong. The following cases will supply instances of convictions on alternative charges, some of which have been upheld and others of which have been reversed:—*The Queen* v. *Utar Narain Singh*, VIII W. R. Crim. Rul. 79: *The Queen* v. *Denonath Bajar*, IX W. R. Crim. Rul. 52: *The Queen* v. *Súndar Mohurí*, IX W. R. Crim. Rul. 25: *The Queen* v. *Bedu Noshya*, XII W. R. Crim. Rul. 11: *The Queen* v. *Kola*, XII W. R. Crim. Rul. 66 and IV B. L. R. A. Crim. 4: *The Queen* v. *Mati Khowa*, III B. L. R. A. Crim. 36: and *The Queen* v. *Nomal*, IV B. L. R. A. Crim. 9. In the last case Mr. Justice Norman said:—"To overlook the difference between the making of contradictory statements by a witness under examination, and the giving of intentional false evidence, is to shut one's eyes to the infirmities of human memory, to fail to understand how slow are the intellects, and how imperfect the powers of expression of uneducated peasants; how readily the fears of such people are excited in Courts of Justice; how completely they lose nerve and presence of mind when frightened. I firmly believe that if a witness could be convicted upon alternative charges of giving false evidence on contradictions of such a character as those supposed to exist in the present case, no native witness of the lower classes, subjected to cross-examination by an adroit and perhaps not over-scrupulous advocate, would be safe."

Other Cases.

In *bastardy* cases, it is the rule of English law that, before an order of affiliation can be made, the evidence of the mother must be corroborated in some material

particular by other testimony. "This rule has been wisely established," says Mr. Taylor, "in order to protect men from accusations which profligate, designing, and interested women might easily make and which, however false, it might be extremely difficult to disprove." These remarks may occasionally be well borne in mind by Magistrates disposing of cases under Chapter XLI of the Code of Criminal Procedure. Finally, Section 2 of "The Evidence Further Amendment Act 1869," 32 & 33 Vict. Cap. 68, enacts that "the parties to any *action for breach of promise of marriage* shall be competent to give evidence in such action: provided always, that no plaintiff in any action for breach of promise of marriage shall recover a verdict unless his or her testimony shall be corroborated by some other material evidence in support of such promise." In such cases in India, as well as in England *spretae injuria formae* is a consideration not to be overlooked in deciding on the value to be attached to individual evidence.

Court must examine all the witnesses offered by the parties.

It is not competent to a Court to refuse to examine any of the witnesses produced by the parties. Where the plaintiff tendered *fifty-eight* witnesses to prove a fact, and the District Court, having taken the depositions of *thirty* of them, refused to permit the examination of the remaining twenty-eight on the ground that they were called to speak to facts sufficiently deposed to by those already examined, the Judicial Committee of the Privy Council remitted the case to the Sádr Court (who had refused to remedy the error of the District Court), being of opinion that the refusal by that Court to admit the examination of the witnesses tendered was irregular, and that no decision could be arrived at on the merits under such circumstances (*Jeswant Sing-jí Ubby Sing-jí and another* v. *Jet Sing-jí Ubby Sing-jí*, II Moo. Ind. Ap. 424. See also *Watson and Co.* v *Nakí Mandal*, VI W. R. Act X Rul. 83: *Raní Ujalla Kumárí Dhujamaní Debya* v. *Gholam Mastafa Khan*, VI W. R. Civ. Rul. 60: *Nilkant Surma and others* v. *Susela Debya and others*, VI W. R. Civ. Rul. 324: *Rakhal Dass Mandal* v. *Protab Chandra Hajra*, XII W. R. Civ. Rul. 455: *Lúlú Singh and another* v. *Rajendra Laha*, VIII W. R. Civ. Rul. 364: *Massamat Shusimokhí Brahmaní* v. *Sham Chandra Rai*, Marsh. Rep. 266: and *Ram Dhan Mandal and another* v. *Rajballab Paramanik and others*, VI B. L. R. Ap. 10). In the last mentioned case it was said—"It has been repeatedly ruled that, unless the object of a party in summoning a large number of witnesses clearly appears to be to impede the adjudication of the case or otherwise obstruct the ends of justice, it is the bounden duty of the Court to receive all evidence tendered." This seems to imply that a Civil Court has the power to refuse to examine a number of witnesses if satisfied that the object of calling a number is to impede the adjudication of the case. It may, however, be

observed that the Code of Civil Procedure contains no Section analogous to Section 359 of the Code of Criminal Procedure, Act X of 1872, which, in cases committed to the Court of Session or High Court, gives a Magistrate a certain discretion in excluding from the list of witnesses to be summoned for the defence before the superior Court the names of persons whose evidence is not really relevant. This Section is as follows:—"If the Magistrate thinks that any witness is included in the list *for the purpose of vexation or delay or of defeating the ends of justice*, he may require the accused person to satisfy him that there are reasonable grounds for believing that such witness is material. If the Magistrate be not so satisfied, he shall not be bound to summon the witness; but in doubtful cases he may summon such witness, if such a sum is deposited with the Magistrate as he thinks necessary to defray the expense of obtaining the attendance of the witness." The duty of Magistrates and Sessions Judges as to summoning and examining witnesses for prosecutors and accused persons in criminal cases is regulated by the following Sections of the Code of Criminal Procedure:—

SUMMONS CASES.

In summons cases.

361. In summons cases, the Magistrate *may* summon any person who appears to him likely to give material evidence on behalf of the complainant or the accused.

Ordinarily it shall be the duty of the complainant and accused, in *non-cognizable cases*, to produce their own witnesses.

In such cases it shall be *in the discretion of the Magistrate to summon any witnesses named by the complainant or the accused;* and he may require, in such cases, a deposit of the expenses of a witness before summoning him.

WARRANT CASES.

In cases tried upon warrant.

362. In warrant cases, the Magistrate shall ascertain from the *complainant*, or otherwise, the names of any persons who may be acquainted with the facts and circumstances of the case, and who are likely to give evidence for the prosecution and *shall summon such of them to give evidence before him as he thinks necessary.*

The Magistrate shall also, subject to the provisions of section three hundred and fifty-nine, *summon any witness and examine any evidence that may be offered in behalf of the accused person to* answer or disprove the evidence against him, and may for that purpose, at his discretion, adjourn the trial from time to time. If the Magistrate refuse to summon a witness named by the accused person, he shall record his reasons for such refusal, and the accused person shall be entitled to appeal to the Court of Session against such refusal.

SESSIONS TRIALS.

363. The accused person shall be allowed to examine any witness *not previously named* by him, if such witness be in attendance; but he shall not, except as provided in section four hundred and forty-eight, be entitled of right to have any witness summoned other than the witnesses named in the list delivered to the Magistrate by whom he was committed or held to bail for trial.

Right of accused as to examination and summoning of witness.

In the case of *Ram Sahai Chaudhrí* v. *Sanker Bahadur*, VI B. L. R. Appen. 65, the Magistrate had refused to summon certain persons named as witnesses by the accused on the ground that they were implicated in the offence charged. They had not, however, been accused. The High Court quashed the conviction. The following cases connected with the same subject may also be referred to:—*In the matter of the petition of Mahima Chandra Saha*, VI B. L. R. Appen. 78: *The Queen* v. *Eshan Dutt and others*, VI B. L. R. Appen. 88: *The Queen* v. *Bhúban Isshur Gosamí*, II W. R. Crim. Rul. 6: *The Queen* v. *Abdúl Sattar*, III W. R. Crim. Rul. 35: *The Queen* v. *Srinath Mukhapadya, and others*, VII W. R. Crim. Rul. 45: *The Queen* v. *Kalí Thakur*, V W. R. Crim. Rul. 65.]

CHAPTER X.—OF THE EXAMINATION OF WITNESSES.

135. The order in which witnesses are produced and examined shall be regulated by the law and practice for the time being relating to Civil and Criminal Procedure respectively, and, in the absence of any such law, by the discretion of the Court.

Order of production and examination of witnesses.

[The Codes of Civil and Criminal Procedure provide for the means of procuring the attendance of witnesses before the Civil and Criminal Courts respectively. The attendance of witnesses before coroners is provided for by "The Coroner's Act," IV of 1871. Act III (B. C.) of 1866 provides for the attendance and examination of witnesses before the Council of the Lieutenant-Governor of Bengal for making Laws and Regulations; and Act XIII (Bom. C.) of 1866 makes similar provisions for the Bombay Council.

The Code of Civil Procedure exempts from personal attendance in Court women, who, according to the custom and manners of the country, ought not to be compelled to appear in public (Section 21). The Government may also at is discretion exempt from personal appearance in Court any person whose rank in the opinion of the Government

Persons exempt from personal attendance in Court.

entitles him to the privilege of exemption, and may at its discretion withdraw such privilege (Section 22). Persons exempted from personal attendance under the above provisions can be examined by commission (see *ante*, pages 142—144). There is no similar exemption from attendance before the Criminal Courts; but a female not accustomed to appear in public may claim to give evidence sitting in a palanquin, having been previously identified to the satisfaction of the Court (*The Queen on the prosecution of Bibi Rukia Banú* v. *J. B. Roberts*, I B. L. R., Short notes vi).

Protection of witnesses from arrest.

According to English law, witnesses are protected from arrest upon any civil process, while going to Court to give evidence, while attending there for the purposes of the case and while returning home. This privilege has been held to be that of the Court and not of the person arrested; and an application for discharge may be made either to the Court before which the witness had to appear or to the Court under the process of which the arrest was made. The making of an arrest in violation of the privilege affords no ground for an action for damages. There is no similar protection against criminal process. The Indian Statute Book does not at present expressly provide for privilege from arrest. The draft of a revised Civil Procedure Code, published in the *Gazette of India Extraordinary* of the 28th April, 1865, contained the following Section (674):—"No person shall be liable to arrest under this Code while attending, going to, or returning from, the Court, either in obedience to a summons or as a party to a suit, appeal, or other proceeding." The subject will no doubt be provided for whenever the Civil Procedure Code may be amended and revised. The privilege has, however, been admitted and allowed in the Mofussil Courts (*Thakúr Das Nundí* v. *Sankar Raí*, III W. R. Crim. Rul. 53).

Remedy for non-attendance of persons as witnesses.

Persons omitting to attend as witnesses or produce documents before Courts of Justice may be punished criminally with fine or imprisonment or with both under the provisions of Sections 174 and 175 of the Indian Penal Code. They are also liable to a civil action for damages under the provisions of Section 26 of Act XIX of 1853, applicable to the Bengal Presidency, and of Section 10 of Act X of 1855, applicable to the Madras and Bombay Presidencies. The provisions of these Sections, which are unrepealed and are almost identical, are as follows:—

"Any person, *whether a party to the suit or not*, to whom a summons to attend and give evidence or produce a document shall be *personally* delivered, and who shall, without lawful excuse, neglect or refuse to obey such summons, or who shall be proved to have absconded or kept out of the way to avoid being served with such summons, and any person who being in Court and upon being required by the Court to

give evidence, or to produce a document in his possession, shall, without lawful excuse, refuse to give evidence or sign his deposition, or to produce a document in his possession, shall, in addition to any proceedings under this Act," (in Section 10, Act X of 1855, "proceedings to which he would otherwise be subject") "be *liable* to the party at whose request the summons shall have been issued, or at whose instance he shall be required to give evidence or produce the document, *for all damages which he may sustain in consequence of such neglect, or refusal, or of such absconding, or keeping out of the way as aforesaid, to be recovered in a civil suit.*"

The measure of the damages in such a case is under English law the cost of withdrawing the record from trial or of obtaining a postponement; but in India it must be borne in mind that under the Civil Procedure Code, a plaintiff cannot withdraw from his suit with liberty to sue again without the permission of the Court (Section 97, and see *ante*, pages 206—207); and where he could not obtain this permission, and being forced to go to trial lost his cause owing to the default of a material witness, the question of damages might be a much more serious matter. Under English procedure a plaintiff may withdraw without going to trial, at his own option, being liable only for the defendant's costs.

Witnesses examined on oath or solemn affirmation.

The Codes of Civil (Section 174) and Criminal (Section 331) Procedure require that witnesses be examined upon oath or affirmation or otherwise according to the provisions of the law for the time being in force in relation to the examination of witnesses. These provisions are at present contained in Acts V of 1840 and VI of 1872: but notice has just been given of the introduction of a Consolidating Bill in the Supreme Council. As to unsworn testimony, see Stat. 6 Vict. Cap. 22. As to the examination of witnesses *de bene esse*, see Section 173 of Act VIII of 1859, and *Edwards* v. *Muller*, V B. L. R. 252.

Witnesses to be examined in the presence of the accused.

In criminal cases witnesses must, as a rule, be examined in the presence of the accused, or of his agent, where he is permitted to appear by agent—a permission which may be granted in cases before Magistrates but not in cases before the Court of Session (see Sections 191 and 214[1] of the Code of Criminal Procedure). It will not be a sufficient compliance with this requirement of the law to read over to the witnesses in the presence of the accused depositions given

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[1] Section 191 relates to *inquiry into cases triable by the Court of Session or High Court;* and Section 214 relates to *warrant cases triable by Magistrates.* There is no specific provision applicable to *summons cases*, Chap. XVI; or to *trials before the Court of Session*, Chap. XIX. This latter Chapter, however, clearly assumes the accused person to be present throughout the trial.

by them on a former trial or in a previous stage of the same trial when the accused was not present, inquiring if these depositions are correct and requiring the witnesses to identify the prisoner. No matter how often the same case comes before the Court, if the accused persons be different on each occasion, the witnesses for the prosecution must be examined *de novo* (*The Queen* v. *Kanai Sheikh*, W. R. Jan.—July, 1864, page 38: *The Queen* v. *Sheikh Kiyamat*, *id.*, p. 1: *The Queen* v. *Afazudín*, *id.*, p. 13: *The Queen* v. *Mattí Nushya*, *id.*, p. 18). A Magistrate cannot properly decide a prosecutor's case without examining his witnesses (*The Queen* v. *Srínath Mukhapadhya and others*, VII W. R. Crim. Rul. 45). *Vivâ voce* examination of the witnesses in open Court, in the presence of the parties, and in the presence and hearing and under the personal direction and superintendance of the Judge or Magistrate is required by the provisions of the Codes of Civil and Criminal Procedure. The importance of seeing the witnesses and of seeing how they give their testimony has been pointed out in the *Introduction*. It is therefore necessary to satisfy the requirements of the law that the witnesses should have been examined in the presence of the Judge or Magistrate who decides the case. If a judicial functionary, having examined some of the witnesses in a case, be prevented by sickness, by transfer or other cause from examining the rest of the witnesses, and finally disposing of the case, his successor is not warranted, unless the parties concerned consent, in taking up the case at the point at which the hearing was stopped, but should commence *de novo*. Sections 328 and 329 of the new Code of Criminal Procedure now contain the following specific provisions on this point applicable to criminal cases:—

Cases partly heard and then transferred to another Judge or Magistrate.

328. Whenever any Magistrate, after having heard part of the evidence in a case, ceases to exercise jurisdiction in such case and is succeeded by another Magistrate who has and who exercises jurisdiction in such case, such last-named Magistrate may decide the case on the evidence partly recorded by his predecessor and partly recorded by himself, or he may re-summon the witnesses and commence afresh:

Convictions on evidence partly recorded by one Magistrate and partly by another.

Provided that the accused person may, when the second Magistrate commences his proceedings, demand that the witnesses shall be re-summoned and re-heard, in which case the trial shall be commenced afresh:

Provided also that any Court of Appeal or Revision, before which the case may be brought,

or in cases tried by Magistrates subordinate to the Magistrate of the District, the Magistrate of the District, without appeal,

may set aside any conviction, passed on evidence not wholly recorded by the Magistrate before whom the conviction was had, if such Court or Magistrate is of opinion that the accused person has been materially prejudiced thereby; and may order a new trial.

Commitments on evidence partly recorded by one officer and partly by another valid.

329. Whenever, from any cause, a Magistrate making an inquiry,[1] under Chapter XV of this Act, is unable to complete the proceedings himself, any other Magistrate having jurisdiction to inquire and to commit, may complete the case and proceed as if he had recorded all the evidence himself.

There is no similar express provision as to cases tried by the Court of Session, but the Sections of the Code applicable to Sessions trials clearly contemplate the whole trial taking place before the same Judge. Under the old Code, it was decided that if the Judge who recorded some of the depositions of the witnesses, were obliged to leave the district before he could conclude the trial, his successor must recommence *de novo* (*The Queen* v. *Charru*, W. R. Jan.—July 1864, p. 32). To the general rule requiring that the whole of the evidence be taken in the presence of the Judge or Magistrate who decides the case there are three exceptions:—

Exceptions to the rule in Criminal Cases.

First, when witnesses are examined by commission, see *ante*, page 145. *Second*, when a Subordinate Magistrate, having jurisdiction, finds an accused person guilty, and considering that a more severe punishment should be inflicted than he is competent to adjudge, submits his proceedings to the Magistrate of the District or to the Magistrate of the Division of a District to whom he is subordinate, and such latter Magistrate proceeds to pass sentence (see Section 46 of the Code of Criminal Procedure). *Thirdly*, when an Appellate Court directs that further enquiry be made or additional evidence taken by the lower Court, and does not think necessary to direct that the appellant be present when such further inquiry is made or such additional evidence taken (see Section 282 of the Code of Criminal Procedure).

In Civil Cases.

The Code of Civil Procedure does not contain any express provision as to the course to be pursued when a case, partly heard, comes into the hands of another Judge; but there can be no doubt that he ought to ask the parties whether they consent to his going on from where his predecessor left off; and if they do not consent, he would be bound to recal and re-examine the witness (*Mussamat Unnapurna* v. *Harballab Singh and others*, VIII W. R. Civ. Rul. 465: *Naranbhai Vrigbhukandas* v. *Narosh Sakar Chandra Shankar and others*, IV Bom. Rep. A. C. J. 98).

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[1] *I. e.* inquiry preliminary to commitment.

Order of examination of witnesses.

The Code of Civil Procedure does not contain any provisions as to the order in which the witnesses of the parties should be examined. The Code of Criminal Procedure is also silent on this point, except indirectly so far as concerns trials before the Court of Session. The *practice* of the subordinate Courts in this respect is especially defective, and stands much in need of reform. It is no uncommon thing for one or two witnesses to be examined on one side, and then one or two on the other side, and so on alternately as it suits the convenience of the parties to produce their witnesses, or the inclination of the Court to hear them. The evil has been frequently noticed by the superior Courts, and many attempts have been made to eradicate it; but it is apprehended that it still exists to no inconsiderable degree, and requires the utmost attention and watchfulness on the part of the appellate and revising tribunals. The Calcutta High Court have laid down the following rules on this subject for observance by the Courts in the Mofussil:—"After the examination of witnesses has commenced, the trial should be proceeded with until all the witnesses on both sides have been examined,—those of the party upon whom the *onus* of proof lies being examined first, and then those of the opposite party, and an adjournment of the hearing shall not be allowed except for sufficient cause, which shall be recorded. Particular attention is called to the last paragraph of Section 145 of Act VIII of 1859, by which it is provided, 'that if the summons shall 'have been issued for the final disposal of the suit, and either party 'shall fail without sufficient cause to produce the evidence on which he 'relies, the Court may at once give judgment.' The same rule is applicable after a day is fixed for trial. Cases may arise in which, from the absence of an important witness, which could not be avoided by the party who requires his evidence, it may be necessary to adjourn the hearing. In such cases, the evidence of the witnesses in attendance shall be taken, and the witnesses shall not be detained, or required to attend again, unless for some special reason to be recorded."[1]

The following rules on this subject are observed under English procedure: *1st*,—The party on whom the burden of proof lies must begin, and the right to begin carries with it the right to reply whenever the adversary adduces evidence. *2nd*,—If the record contains several issues, and the burden of proving any one of them lies on the plaintiff, he is entitled to begin, provided he will undertake to give evidence upon it.

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[1] See paras. 9 and 10 of the Rules laid down by Circular Order No. 31 of the 13th October, 1863, page 61 of the first volume of the Author's *General Rules and Circular Orders*.

Speeches of Counsel.

The Code of Criminal Procedure makes no provision for barristers, pleaders, or other persons addressing the Court in Magistrates' cases or in the course of proceedings preliminary to commitment. Sections 251 and 252 of the same Code provide for the exercise of this right at trials before the Court of Sessions. The Code of Civil Procedure is wholly silent on the subject; but in practice Mofussil practitioners address the Courts as is usual elsewhere, and their right to do so has been recognized in more than one decided case, see, *e. g.*, *Jardine* v. *Tarini Mohan Sen and others*, VIII B. L. R. Appen. 44, in which a new trial of an appeal was directed, because the lower Appellate Court had not heard the appellant's pleader in reply.]

Judge to decide as to admissibility of evidence.

136. When either party proposes to give evidence of any fact, the Judge may ask the party proposing to give the evidence in what manner the alleged fact, if proved, would be relevant; and the Judge shall admit the evidence if he thinks that the fact, if proved, would be relevant, and not otherwise.

If the fact proposed to be proved is one of which evidence is admissible only upon proof of some other fact, such last-mentioned fact must be proved before evidence is given of the fact first mentioned, unless the party undertakes to give proof of such fact and the Court is satisfied with such undertaking.

If the relevancy of one alleged fact depends upon another alleged fact being first proved, the Judge may in his discretion either permit evidence of the first fact to be given before the second fact is proved, or require evidence to be given of the second fact before evidence is given of the first fact.

Illustrations.

(*a.*) It is proposed to prove a statement about a relevant fact by a person alleged to be dead, which statement is relevant under section thirty-two.

The fact that the person is dead must be proved by the person proposing to prove the statement before evidence is given of the statement.

(*b.*) It is proposed to prove by a copy the contents of a document said to be lost.

The fact that the original is lost must be proved by the person proposing to produce the copy before the copy is produced.

(*c.*) A is accused of receiving stolen property knowing it to have been stolen.

It is proposed to prove that he denied the possession of the property.

The relevancy of the denial depends on the identity of the property. The Court may in its discretion either require the property to be identified before the denial of the possession is proved, or permit the denial of the possession to be proved before the property is identified.

(*d.*) It is proposed to prove a fact (A) which is said to have been the cause or effect of a fact in issue. There are several intermediate facts (B, C, and D) which must be shown to exist before the fact A can be regarded as the cause or effect of the fact in issue. The Court may either permit A to be proved before B, C, or D is proved, or may require proof of B, C, and D before permitting proof of A.

[See Section 104, *ante*, pages 84, 85; and Section 104, *ante*, page 369.]

Examination-in-chief.

137. The examination of a witness by the party who calls him shall be called his examination-in-chief.

Cross-examination.

The examination of a witness by the adverse party shall be called his cross-examination.

Re-examination.

The examination of a witness, subsequent to the cross-examination, by the party who called him, shall be called his re-examination.

Order of examination. Direction of re-examination.

138. Witnesses shall be first examined-in-chief, then (if the adverse party so desires) cross-examined, then (if the party calling him[1] so desires) re-examined.

The examination and cross-examination must relate to relevant facts, but the cross-examination

[1] *Sic* in *Gazette* copy of Act.

need not be confined to the facts to which the witness testified on his examination-in-chief.

The re-examination shall be directed to the explanation of matters referred to in cross-examination; and if new matter is, by permission of the Court, introduced in re-examination, the adverse party may further cross-examine upon that matter.

Provisions of the Code of Criminal Procedure.

[As to the examination, cross-examination, and re-examination of witnesses in criminal cases, see also the following Sections of the Code of Criminal Procedure, *viz.*:—Section 191, which entitles the accused person or his agent, in proceedings preliminary to commitment, to examine and re-examine his own witnesses, and to cross-examine the complainant and his witnesses—Section 214, which extends the provisions of Section 191 to the trial of warrant cases by Magistrates—Section 218, which entitles the accused person in the same class of cases to re-call and cross-examine the witnesses for the prosecution after the charge has been read and he has pleaded thereto—and Section 247, which enacts that in Sessions trials, after the accused has pleaded to the charge, and the assessors or jurors have been chosen, the witnesses shall be examined, cross-examined, and re-examined according to the law for the time being relating to the examination of witnesses. It may be observed that the Code of Criminal Procedure contains no *express* provision for the cross-examination and re-examination of the witnesses either of the complainant or of the accused in summons cases under Chapter XVI; or for the cross-examination by the complainant or prosecutor of witnesses called by the accused in the course of proceedings preliminary to commitment; or in warrant cases, under Chapters XV and XVII respectively. The Code of Civil Procedure is wholly silent on the subject of cross-examination and re-examination.

Limits of cross-examination.

According to the practice followed in England and Ireland, the cross-examination is not limited to the matters upon which the witness has already been examined-in-chief, but extends to the whole case; and therefore, if a plaintiff calls a witness to prove the simplest fact connected with his case, the defendant is at liberty to cross-examine him on every issue, and by putting leading questions to establish, if he can, his entire defence. In America a different rule prevails, it having been determined by the Supreme Court that a party has no right to cross-examine any witness except as to circumstances connected with matters stated in his direct examination: and that, if he wishes to examine him respecting other matters, he must do so by making him

his own witness, and by calling him as such in the subsequent progress of the cause. In the case of *The Queen* v. *Eshan Dutt and others*, VI B. L. R. Ap. 88, the Calcutta High Court followed the English rule, which has also been substantially adopted by the Indian Evidence Act, for by the above Section the cross-examination, provided it relate to *relevant* facts, need not be confined to the facts to which the witness testified on his examination-in-chief. Besides questions relating to relevant facts a witness may further be asked the questions provided for by Section 146, *post*. Unless with his own consent, evidence is not legally admissible for or against a party, who at the time that it was given had no opportunity of cross-examining the witnesses or of rebutting their testimony by other evidence (see *ante*, pages 139, 141; and *Gorachand Sirkar* v. *Ram Narain Chaudhri and others*, IX W. R. Civ. Rul. 587). In this latter case the lower Courts had improperly admitted as evidence, in a suit for enhancement of rent, the depositions of witnesses taken in another and similar case. When a case, decided *ex parte*, in the absence of the defendant, who had thus no opportunity of cross-examining the plaintiff's witnesses, was re-admitted to the file and to a hearing, it was held that the Court of first instance ought to have recalled the plaintiff's witnesses and allowed the defendant an opportunity of cross-examining them; and this not having been done, that their previous depositions could not be treated as evidence (*Ram Baksh Lal* v. *Kishori Mohun Saha and others*, III B. L. R. A. C., 273). "Whether," says Mr. Taylor, "when a party is once entitled to cross-examine a witness, this right continues through all the subsequent stages of the cause, so that if he afterwards recall the same witness to prove a part of his own case, he may interrogate him by leading questions, and treat him as the witness of the party who first adduced him, is also a question upon which different opinions have been entertained. The general principle upon which this course of examination is permitted, namely, that every witness is supposed to be inclined most favourably towards the party calling him, is scarcely applicable to a case where a person is equally the witness of both sides; and it seems that in common fairness each party should alternately have the right of cross-examining such a witness as to his adversary's case, while both should be precluded, in the course of the respective examinations-in-chief, from putting leading questions with regard to their own."[1] This result will doubtless follow from the above provisions of the Indian Evidence Act, more especially from the definitions given in Section 137. The party who *calls* a witness—apparently, at any stage of the case—examines him in chief. Such examination-in-chief would naturally be directed to the support of his own case, upon which the adverse party

[1] § 1290.

would then have the right to cross-examine. If the adverse party again *called* the same witness, he could clearly only examine him in chief. Where a witness called and examined by the plaintiff was not cross-examined on behalf of the defendants, the Court refused to allow him to be called afterwards for the defendants, as the leave of the Court had not been asked and obtained at the close of his first examination (*Makintosh* v. *Nabin Mani Dasi and others*, II Jur. N. S. 161).

Use of cross-examination.

Cross-examination properly conducted is one of the most useful and efficacious means of discovering truth. "By means of it," says Mr. Taylor, "the situation of the witness with respect to the parties and to the subject of litigation, his interest, his motives, his inclination and prejudices, his character, his means of obtaining a correct and certain knowledge of the facts to which he bears testimony, the manner in which he has used those means, his powers of discernment, memory, and description are all fully investigated and ascertained and submitted to the consideration of the jury, who have an opportunity of observing his demeanour and of determining the just value of his testimony. It is not easy for a witness subjected to this test to impose on a Court or jury; for, however artful the fabrication of falsehood may be, it cannot embrace all the circumstances to which a cross-examination may be extended."[1]—"Where a witness is evidently prevaricating or concealing the truth," says Mr. Alison, "it is seldom by intimidation or sternness[2] of manner that he can be brought, at least in this country, to let out the truth. Such measures may sometimes terrify a timid witness into a true confession; but in general they only confirm a hardened one in his falsehood, and give him time to consider how seeming contradictions may be reconciled. The *most effectual method* is to examine rapidly and minutely as to a number of subordinate and apparently trivial points in his evidence, concerning which there is little likelihood of his being prepared with falsehood ready made; and where such a course of interrogation is skilfully laid, it is rarely that it fail in exposing perjury or contradiction in some parts of the testimony, which it is desired to overturn. It frequently happens that in the course of such a rapid examination facts most material to the cause are elicited, which were either denied, or but partially admitted before. In such cases there is no good grounds on which the facts thus

[1] § 1285: and see *ante*, pages 43—60.

[2] A prisoner's counsel, in a case before the late Baron Anderson, sat down after a lengthened, angry, and ineffectual cross-examination of a witness for the prosecution. "Witness," said the Baron, "do you happen to know what 'cross-examination' means?"—"No, my lord," he replied. "Then I will tell you what it means, sometimes: putting over again all the questions in examination-in-chief, but *in a very cross manner*."

reluctantly extorted, or which have escaped the witness in an unguarded moment, can be laid aside by the jury. Without doubt they come tainted from the polluted channel through which they are educed; but still it is generally easy to distinguish what is true in such depositions from what is false, because the first is studiously withheld, and the second is as carefully put forth; and it frequently happens that in this way the most important testimony in a case is extracted from an unwilling witness, which only comes with the more effect to an intelligent jury, because it has emerged by the force of examination in opposition to an obvious desire to conceal."[1] Bullying and browbeating a witness, misleading him, as for instance by putting questions which assume facts to have been proved, which have not been proved, or that particular answers have been given contrary to the fact—questioning him in a manner which assumes that he has been lying throughout the whole or the greater part of his examination-in-chief—confusing him when stupid—terrifying him when timid—will oftener than otherwise fail to search the mind and conscience of an adverse witness, when suavity of manner, gentleness and courtesy will surely put him off his guard, while rapid and subtle questioning elicits from him innumerable *insignificant* facts, as they may appear to him at the moment, but which when put together by a master hand create a whole in which the most ignorant beholder instinctively recognizes—THE TRUTH.

Object of re-examination.

The proper object of *re-examination* is to draw forth an explanation of the meaning of the expressions used by the witness on cross-examination; and also of the motive or provocation which induced him to use them; to clear up evident misconceptions and errors committed by him while under examination; and to explain new facts which have come out on cross-examination. In England it is not permitted to go further and introduce matter new in itself. Thus proof on cross-examination of a detached statement, made by or to a witness at a former time, does not authorize proof by the party calling that witness of all that was said at the same time, but only of so much as can be in some way connected with the statement proved. And where a witness had been cross-examined as to what the plaintiff had said in a particular conversation, it was held that he could not be re-examined as to other assertions, made by the plaintiff in the same conversation, that were not connected with the assertions to which the cross-examination related, *although they were connected with the subject-matter of the suit.* Under the above Section of the Indian Evidence Act new matter relevant to the suit may, *by permission* of the Court, be introduced in re-examination; but if so introduced, the adverse party may

[1] Allison's *Practice of the Criminal Law of Scotland*, 546, 547.

further cross-examine upon such matter. Under the English rule it may be observed that any hardship is frequently obviated, when a question has been omitted in the examination-in-chief, and as not arising out of the cross-examination cannot be put in re-examination by asking the Judge to put it—a request which is generally complied with.]

Cross-examination of person called to produce a document.

139. A person summoned to produce a document does not become a witness by the mere fact that he produces it, and cannot be cross-examined unless and until he is called as a witness.

Person summoned to produce document merely need not attend personally.

[With this Section may be read Section 153 of the Code of Criminal Procedure, which enacts that "any person, whether a party to a suit or not, may be summoned to produce a document, without being summoned to give evidence; and any person, summoned merely to produce a document, shall be deemed to have complied with the summons, *if he cause such document to be produced instead of attending personally to produce the same.*" It may be observed that Section 26 of Act II of 1855, which was *verbatim* the same as the Section just quoted, applied equally to civil and criminal proceedings. It was repealed by Act X of 1861, but only in so far as it was applicable to suits and proceedings under Act VIII of 1859; and it remained in force with respect to criminal proceedings until the whole Act was repealed by the second Section of the Evidence Act, neither in which nor in the new Code of Criminal Procedure has the Section been reproduced in relation to criminal proceedings, to which there are no similar provisions now expressly applicable.

Other points.

The rule contained in the above Section is in accordance with the rule of English law. The witness who merely produces a document need not be sworn, and if unsworn he cannot be cross-examined. If a competent witness be intentionally called and sworn, the opposite party is entitled to cross-examine him, although the party calling him has declined to ask him a single question. Where, however, a witness was sworn under a mistake, which was discovered before the examination-in-chief had begun, no cross-examination was allowed; and so, where the examination-in-chief of a witness was stopped by the Judge after he had answered merely an immaterial question. When more than one prisoner were tried on the same indictment and were separately defended, it was held that a witness called on behalf of one of them, and who gave evidence tending to criminate the others, might be

cross-examined on behalf of those others. The Indian Evidence Act does not expressly provide for these cases.]

Witnesses to character.

140. Witnesses to character may be cross-examined and re-examined.

[The practice in England is not to cross-examine, except under special circumstances, witnesses called merely to speak to the character of a prisoner; but there is no rule which forbids the cross-examination of such witnesses.]

Leading question.

141. Any question suggesting the answer which the person putting it wishes or expects to receive, is called a leading question.

[Mr. Bentham defines a *leading question* to be one which indicates to the witness the real or supposed fact which the examiner expects and desires to have confirmed by the answer. Is not your name so and so? Do you not reside in such a place? Are you not in the service of such and such a person? Have you not lived so many years with him?—and he observes that, under this form, every sort of information may be conveyed to the witness in disguise. It may be used to prepare him to give the desired answers to the questions about to be put to him; the examiner, while he pretends ignorance and is asking for information is in reality *giving*, instead of *receiving* it. This kind of leading question has been otherwise described as a question which embodies a material fact, which may or may not have been before known to the witness, and admits of a conclusive answer by a simple negative or affirmative. Such a question ought not to be put even in cross-examination, unless under special circumstances—and it will be observed that this definition of the term "leading question" is somewhat different from that given in the Indian Evidence Act, which provides in Section 143 that leading questions may be asked in cross-examination.]

When they must not be asked.

142. Leading questions must not, if objected to by the adverse party, be asked in an examination-in-chief, or in a re-examination, except with the permission of the Court.

The Court shall permit leading questions as to matters which are introductory or undisputed, or which have, in its opinion, been already sufficiently proved.

["To abridge the proceedings, and bring the witness as soon as possible to the material points on which he is to speak, the counsel," says Mr. Taylor, "may lead him on to that length, and may recapitulate to him the acknowledged facts of the case, which have been already established. The rule, therefore, is not applied to that part of the examination which is merely introductory of that which is material. With respect even to material points, the Judge, in his discretion, will sometimes allow leading questions to be put in a direct examination, as for instance where the witness, by his conduct in the box, obviously appears to be *hostile* to the party producing him, or *interested* for the other party, or *unwilling* to give evidence. Indeed, if the witness stand in a situation which of necessity makes him adverse to the party calling him, as if he be a *defendant* whom the plaintiff wishes to examine,[1] leading questions may, it seems, be asked him as a matter of right. . . . . Again, a witness will occasionally be allowed to be led, where an omission in his testimony is evidently caused by *want of recollection*,[2] which a *suggestion* may assist. Thus, when a witness stated that he could not recollect the names of the members of a firm, so as to repeat them without suggestion, but thought that he might possibly recognize them if suggested, this was permitted to be done. So, for the purpose of *identification*, the witness may be directed to look at a particular person,[3] and say whether he is the man. So, where, from the nature of the case, the mind of the witness cannot be directed to the subject of inquiry without a particular specification of it, as where he is called to contradict another respecting the contents of a lost letter, and cannot off-hand recollect all its contents, the particular passage may be suggested to him, at least after his unaided memory has been exhausted. So, where a witness in called to *contradict* another, who has denied having used certain expressions, counsel are sometimes permitted to ask whether the particular words denied were

Leading questions when usually allowed in examination-in-chief.

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[1] As in *Radha Jiban Mústafi* v. *Tara Mani Dasi*, XII Moo. Ind. Ap. 380, where this part of the rule was recognized.

[2] "It may frequently happen," says Mr. Starkie, "that a witness, unable to detail even the substance of a particular conversation, may yet be able to negative with confidence proposals, offers, statements, or other matters sworn to have been made in the course of a conversation."

[3] If, however, the witness was suspected, this would be improper, and the witness should be told to look round the Court and say if he there saw the person of whom he was speaking. Much depends upon the circumstances of each particular case. For example, if the defence were an *alibi*, it would be clearly improper to ask the witness, "did you see the prisoner there?"—a question which would be perfectly proper if the defence were that the prisoner, though present at the spot, had no share in the alleged offence.

not in fact uttered by the former witness; but this rule seems only to apply to such expressions as in themselves are not evidence in the cause; the object of relaxing the general rule being simply to exclude the other parts of the conversation, which would not be admissible. Again, the Court will sometimes allow a pointed or leading question to be put to a *witness of tender years*, whose attention cannot otherwise be called to the matter under investigation; and, indeed, it must always be remembered that the Judge has a discretionary power—not controllable on a bill of exceptions—of relaxing the general rule, whenever and under whatever circumstances and to whatever extent he may think fit, though the power should only be exercised so far as the purposes of justice plainly require."[1] Compare Section 1842 of The New York Civil Code:—" A question, which suggests to the witness the answer which the examining party desires, is denominated a leading or suggestive question. On a direct examination, leading questions are not allowed, except in the sound discretion of the Court, under special circumstances, making it appear that the interests of justice require it." See also Section 154, *post*.

As soon as the witness has been conducted to the material portion of his examination, as soon as the time and place of the scene of action have been fixed, " it is generally the easiest course," says Mr. Starkie, "to desire the witness to give his own account of the matter, making him omit, as he goes along, an account of what he has heard from others, which he always supposes to be quite as material as that which he himself has seen. If a vulgar, ignorant witness be not allowed to tell his story in his own way, he becomes embarrassed and confused, and mixes up distinct branches of his testimony. He always takes it for granted that the Court and the jury know as much of the matter as he does himself, because it has been the common topic of conversation in his own neighbourhood; and therefore his attention cannot easily be drawn so as to answer particular questions, without putting them in the most direct form. It is difficult, therefore, to extract the important parts of his evidence piecemeal, but if his attention be first drawn to the transaction by asking him, when and where it happened, and he be told to describe it from the beginning, he will generally proceed in his own way to detail all the facts in the order of time."[2] So Mr. Alison says:—"It is often a convenient way of examining, to ask a witness whether such a thing was said or done, because the thing mentioned aids his recollection, and brings him to that state of the proceeding on which it is desired that he should dilate. But this is not always fair; and when any subject is approached, on which his evidence is expected to be really

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[1] §§ 1262A, 1263.
[2] Starkie on Evidence, p. 167.

important, the proper course is to ask him what was done, or what was said, or to tell his own story. In this way, also, if the witness is at all intelligent, a more consistent and intelligible statement will generally be got than by putting separate questions; for the witnesses generally think over the subjects, on which they are to be examined in criminal cases, so often, or they have narrated them so frequently to others, that they go on much more fluently and distinctly, when allowed to follow the current of their own ideas, than when they are at every moment interrupted or diverted by the examining counsel."[1] See in connection the Author's remarks, *ante*, page 45.

In order to object properly or successfully to questions as leading, it is important to form an accurate idea of what a *leading question* really is. "I wish," said Lord Ellenborough in a case[2] before him, "that objections to questions, as leading, might be a little better considered before they are made. It is necessary to a certain extent to lead the mind of the witness to the subject of inquiry. If questions be asked to which the answer 'yes' or 'no' would be conclusive, they would certainly be objectionable: but, in general, no objections are more frivolous than those which are made to questions as frivolous."]

When they may be asked.

143. Leading questions may be asked in cross-examination.

[In order to understand accurately the effect of this Section, it will be necessary to bear in mind the definition of a "leading question" given in Section 141, *ante*. There are some questions called *leading* in loose parlance, which ought not to be put even in cross-examination. "With respect to the mode of conducting a cross-examination," says Mr. Taylor, "it is admitted on all hands, that *leading questions may* in general *be asked;* but this does not mean that the counsel may go the length of putting the very words into the mouths of the witness which he is to echo back again;[3] neither does it sanction the putting of a question which assumes that facts have been proved which have not been proved, or that particular answers have been given contrary to the fact."[4]]

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[1] Alison's *Practice of the Criminal Law of Scotland*, p. 546.

[2] *Nicholls* v. *Dawding and Kemp*, 1 Starkie's Nisi Prius Rep. 81.

In *R.* v. *Hardy*, 24 Howell's State Trials, 755, Mr. Justice Buller said—"You may lead a witness on cross-examination to bring him directly to the point as to the answer; but must not go the length, as was attempted yesterday, of putting into his mouth the very words which he is to echo back again."

Evidence as to matters in writing.

144. Any witness may be asked, whilst under examination, whether any contract, grant or other disposition of property, as to which he is giving evidence, was not contained in a document, and if he says that it was, or if he is about to make any statement as to the contents of any document, which, in the opinion of the Court, ought to be produced, the adverse party may object to such evidence being given until such document is produced, or until facts have been proved which entitle the party who called the witness to give secondary evidence of it.

Explanation.—A witness may give oral evidence of statements made by other persons about the contents of documents if such statements are in themselves relevant facts.

Illustration.

The question is whether A assaulted B.

C deposes that he heard A say to D—'B wrote a letter accusing me of theft, and I will be revenged on him.' This statement is relevant, as showing A's motive for the assault, and evidence may be given of it, though no other evidence is given about the letter.

[With this Section should be read Section 91, *ante*, page 309; and Section 65, *ante*, page 283.

"*the adverse party may object*" &c. But if the case is tried in a Court in which there are no properly qualified practitioners, or if none be employed in the case, or if the adverse party, himself ignorant of the law and of his privilege, do not object—should the Court disallow the evidence until the document be produced or until facts have been proved which entitle the party concerned to give secondary evidence? In criminal cases tried under the provisions of the Code of Criminal Procedure, Act X of 1872, the Court should certainly do so, for Section 256 of that Code declares it to be the duty of the Judge, *in his discretion, to prevent the production of inadmissible evidence, whether it is or is not objected to by the parties.* In civil cases there may be more doubt, the Code of Civil Procedure being silent on the subject. See, however, the last portion of para. 3 of Section 165 of the Evidence Act, *post;* and consider the effect of Section 59, of "must" in Section 64, of Section 65, and of "shall" in Section 66, *ante.*]

Cross-examination as to previous statements in writing.

145. A witness may be cross-examined as to previous statements made by him in writing or reduced into writing and relevant to matters in question without such writing being shown to him, or being proved; but if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him.

[This Section is word for word nearly the same as Section 24 of *The Common Law Procedure Act*, 1854 (17 & 18 Vict., Cap. 128), which however, contains the following additional proviso, *viz.*:—"Provided always, that it shall be competent for the Judge, at any time during the trial, to require the production of the writing for his inspection, and he may thereuopn make such use of it for the purposes of the trial as he shall think fit." This proviso is, however, substantially contained in Section 165, *post*. The above Section of the Common Law Procedure Act, 1854, altered the rule laid down in the *Queen's case*,[1] *viz.*, that before the witness can be cross-examined as to the contents of a document, the cross-examining counsel must produce it as his evidence and have it read. This rule, as Mr. Taylor remarked, excluded one of the best tests by which the memory and integrity of a witness can be tried, it being clear that, if the object of the cross-examination was to test the witness's memory, this would be entirely frustrated by reading out the letter to him before asking him any questions about it. It was, however, only in accordance with the general principle, which forbids all use of the contents of a written instrument until the instrument itself be produced. Mr. Day, speaking of the Section of the Common Law Procedure Act, 1854, remarks—"The effect is this, the witness, in the first instance, may be asked whether he has made such and such a statement in writing, without its being shown to him. *If he denies that he has made it*, the opposite party cannot put in the statement without first calling his attention to it (showing it, or at least reading it to him) and to any parts of it relied upon as a contradiction. *If the witness, instead of denying that he has made the statement*, admits it, although the object of the cross-examining counsel has been attained, it may be very important for the party calling the witness to have the whole statement, which may not be in his possession, before the Court and jury. If he is aware of the

Rule laid down in the Queen's case altered.

Alteration of the law.

[1] 2 Broderip and Bingham's Rep. 286.

contents, he will, it would seem, in such case, be at liberty to re-examine the witness, as to the residue of the statement, *without its being produced*, on the general rule that if part of any connected conversation or statement be given, the whole may be used; or he may ask the Judge, under the latter part of the Section,[1] to require the production of the writing. It must *be always* borne in mind that this Section is confined to written statements *made by the witness* relative to the subject-matter of the cause. This Section, therefore, does not interfere with the decision in *Macdonnell* v. *Evans* (11 C. B. 930). In that case, upon the cross-examination of a witness, a letter in his own handwriting was shown to him, and he was asked 'did you not write that letter *in answer to a letter charging you with forgery?*' It was held that the question was inadmissible for *any* purpose, inasmuch as it was an attempt to get at the contents of a written document which might have been produced. As the question, therefore, referred to the contents of a letter written by a third person, and not by the witness, the case is not affected by this Section. It is right to notice this, as the Commissioners, in their second report, apparently refer to the case of *Macdonnell* v. *Evans* as one of the judicial decisions proceeding on the rule, which is now superseded."[2] It may be doubted, however, if Mr. Day sufficiently considered the effect of the words "*reduced into writing*" and of the disjunctive "*or*."

Where a party gave evidence in his own case, it was held by a majority of two out of three Judges that he might be asked, on cross-examination, with a view of testing his credit, whether an action had not previously been brought against him in respect of a similar claim, upon which he had given evidence, and the verdict of the jury was, notwithstanding, against him—and this, without producing the record of the proceedings in the previous case (*Henman* v. *Lester*, 31 Law Journal Rep. C. P. 366).

What course is to be pursued, if the document have been *lost* or *destroyed*, and whether in these or in any other cases a *copy* can be used instead of the *original*, are points upon which the English and Indian Acts are alike silent.

The English enactment does not apply to Criminal Courts. The Section of the Indian Act applies to all Courts, civil or criminal; and its provisions could, therefore, be applied at trials before the Court of Session to depositions taken before the committing Magistrate. "In criminal cases," says Mr. Stephen, speaking of the practice in England, "the old rule still applies.[3] Its most frequent application in practice is that the prisoner's counsel is prevented from asking the witness

[1] In India under Section 165, *post*.

[2] Day's Common Law Practice, p. 214.

[3] The rules on the subject laid down by the Judges will be found in Mr. Taylor's work, § 1304.

whether in his deposition before the Magistrate he did not give a different account, unless he puts in the depositions as his own evidence, and so gives the prosecutor the right to reply. This is not really a grievance, for if the contradiction is serious, there is no reason why the depositions should not be put in. If it is trifling, the rule saves time and checks quibbling. Moreover, *the Judge will frequently look at the depositions himself*, and, if he thinks the contradiction important, will read them, which does not give the prosecutor a reply. . . . . This rule is at present in the course of being relaxed in practice. Some Judges act on the principle that the depositions are always in evidence, and allow counsel to cross-examine on them without putting them in. Mr. Justice Willes acted on this principle on the Midland Circuit throughout the whole of the Lent Assize of 1863." (*View of the Criminal Law of England*, *p.* 316.) Mr. Taylor observes that the rules were intended chiefly to check the licence of counsel, and are not binding on the Judges themselves who have a discretionary power of questioning a witness as to any *discrepancy* between his evidence in Court and his former statement without putting in the depositions. The practice in England being thus not definitely settled, let us see what is the practice in India. So far as I am aware, no definite rules have been laid down on the subject; but in the case of *The Queen* v. *Bindaban Bauri and others* (V W. R. Crim. Rul. 54), the Calcutta High Court suggested that the Sessions Judge should have before him the depositions taken by the commiting Magistrate; and, comparing the statements of the witnesses there recorded with the evidence of the same witnesses as given at Sessions, should put questions, the answers to which may clear up discrepancies or possibly elicit facts favorable to the prisoner. The depositions taken by the committing Magistrate are always sent up and are with the Sessions Judge during the trial. The accused can, if he wishes, have a copy of these depositions (see Section 201 of the Code of Criminal Procedure). He or his counsel or pleader can therefore inform himself of what the witnesses said before the Magistrate, and is in a position to question any witness who varies in the Court of Session from his former statement. If a *copy* of the depositions given before the Magistrate be not sufficient for the purpose of the above Section of the Indian Evidence Act (which I apprehend that it would), the Sessions Judge ought, if asked, to allow the original deposition to be used. Where the Sessions Judge himself noticed the discrepancy and it was material, there can be little doubt that in using the original deposition for the same purpose himself, he would be acting wholly within the scope of his duty as indicated by the provisions of the Evidence Act and of the Code of Criminal Procedure. In connection with the

Practice in criminal cases as to depositions.

Practice in India.

subject it will further be important to consider the provisions of Section 249 of the Code of Criminal Procedure, which allows the Court of Session or High Court to refer to the evidence given by a witness before the Magistrate, and *ground its judgment thereon, although the witness may at the trial make statements inconsistent therewith* (see *ante*, page 142)—and also Section 126 of the same Code, which is as follows :—"A Police officer, making an investigation under this chapter, shall, day by day, enter his proceedings in the investigation in a diary, setting forth the time at which the complaint or other information reached him, the time at which he began and closed his investigation, the place or places visited by him, and a statement of the circumstances ascertained by his investigation."

Police Diaries.

"Any Criminal Court may send for the Police diaries of a case under inquiry or trial in such Court, and may use such diaries to aid it in such inquiry or trial. Neither the prisoner nor his agents shall be entitled to call for them, nor shall he or they be entitled to see them merely because they are referred to by the Court; but *if they are used by the Police officer who made them, to refresh his memory, or if the Court uses them for the purpose of contradicting such Police officer*, the provisions of the law relating to documents used for such purposes shall apply to them."—

"Questions not unfrequently arise," says Mr. Taylor, "as to whether or not a party is entitled to see a document which has been shown to one of his witnesses while under cross-examination by his opponent. The cases on this subject are somewhat conflicting; but the practice seems to be as follows: — If the cross-examining counsel, after putting a paper into the hands of a witness, merely asks him some question as to its general nature or identity, or respecting the character of the handwriting, his adversary will have no right to see the document; but if the paper be used for the purpose of refreshing the momory of the witness, or if any questions be put respecting its contents, a sight of the document may then be demanded by the opposite counsel." (§ 1307.)

The Section at present under notice relates to previous statements *made in writing or reduced into writing*. If, however, the previous statements were *verbal*, evidence could also be given to show that they were contradictory, if only they were relevant to the issue (see para. 3, Section 155, *post*). Whether the witness's attention should first be drawn to the statements here also, and whether he should be asked if he ever made them, before his credit can be impeached by independent evidence, is a point not provided for by the Indian Evidence Act. Where, as so frequently happens in India, a witness neither

Previous verbal statements.

denies nor admits having made a former contradictory statement, but replies that he does not remember, the following provision of the Common Law Procedure Act, 1854 (Section 23), is most useful, and might well have been introduced into the Act, *viz.* :—"If a witness, upon cross-examination as to a former statement made by him relative to the subject-matter of the cause, and inconsistent with his present testimony, *does not distinctly admit* that he has made such statement, proof may be given that he did in fact make it; but before such proof can be given, the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he has made such statement."]

Questions lawful in cross-examination.

146. When a witness is cross-examined, he may, in addition to the questions hereinbefore referred to, be asked any questions which tend

(1) to test his veracity;

(2) to discover who he is and what is his position in life, or

(3) to shake his credit, by injuring his character, although the answer to such questions might tend directly or indirectly to criminate him, or might expose or tend directly or indirectly to expose him to a penalty or forfeiture.

When witness to be compelled to answer.

147. If any such question relates to a matter relevant to the suit or proceeding, the provisions of section one hundred and thirty-two shall apply thereto.

[The words, "*in addition to the questions hereinbefore referred to*," in Section 146 are to be read with para. 2 of Section 138, *ante*, which provides that the cross-examination must relate to *relevant* facts, although it need not be confined to the facts to which the witness testified on his examination-in-chief. In addition, then, to questions which relate to relevant matters, a witness may further be asked the questions mentioned in Section 146. But these latter questions may or may not relate to relevant matters. If they relate to *relevant* matters, the witness must answer, whether or not his answer will criminate him or tend to criminate him, or expose or tend directly or indirectly to expose

him to a penalty or forfeiture of any kind (Sections 132 and 147[1]); and *evidence will be admissible to contradict his answers.* If the questions relate to *irrelevant* matters, it will, generally speaking, be in the discretion of the Court to compel him to answer or not (Section 148), and evidence will *not be admissible to contradict the answer when given*, unless in the cases provided for by the *Exceptions* to Section 153, *post.* This is all in general accordance with the rules of English law on the same subject.]

Court to decide when question shall be asked and when witness compelled to answer.

148. If any such question relates to a matter not relevant to the suit or proceeding, except in so far as it affects the credit of the witness by injuring his character, the Court shall decide whether or not the witness shall be compelled to answer it, and may, if it thinks fit, warn the witness that he is not obliged to answer it. In exercising its discretion, the Court shall have regard to the following considerations:

(1.) Such questions are proper if they are of such a nature that the truth of the imputation conveyed by them would seriously affect the opinion of the Court as to the credibility of the witness on the matter to which he testifies.

(2.) Such questions are improper if the imputation which they convey relates to matters so remote in time, or of such a character, that the truth of the imputation would not affect, or would affect in a slight degree, the opinion of the Court as to the credibility of the witness on the matter to which he testifies.

(3.) Such questions are improper if there is a great disproportion between the importance of the imputation made against the witness's character and the importance of his evidence.

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[1] It might almost appear that Section 147 is superfluous, unless it was intended that a distinction be drawn between "*relevant to the suit or proceeding*" in Section 147, and "*relevant to the matter in issue in any suit or in any civil or criminal proceeding*" in Section 132.

(4.) The Court may, if it sees fit, draw, from the witness's refusal to answer, the inference that the answer if given would be unfavourable.

[The words, "*not relevant to the suit or proceeding, except in so far as it affects the credit of the witness by injuring his character*,"[1] in the above Section, would seem to be synonymous with the words "*relevant to the inquiry only in so far as it tends to shake his credit by injuring his character*," in Section 153, *post*: and the result appears to be that Section 148 assumes it as a general proposition that *a witness cannot be compelled to answer irrelevant questions*; and Section 153 assumes it as a further general proposition that, *if a witness do answer an irrelevant question, his answer cannot be contradicted by other evidence.* Section 148 then provides that when a question, although irrelevant, affects the credit of the witness by injuring his character, the Court shall have a discretion (for the exercise of which certain rules are laid down) in compelling an answer or not:—and Section 153 enacts that where such a question has been answered, the usual rule as to the inadmissibility of evidence to contradict answers to irrelevant questions shall apply, save and except in two cases; but that, if the witness answers falsely, he may afterwards be charged with giving false evidence. It may be observed that this provision as to a charge for giving false evidence is unnecessary in India, where it is not essential in order to a prosecution for "*giving false evidence*," according to the definition of this offence in the Penal Code, as it is in England to a prosecution for *perjury*, that the matter charged as false should have been material to the issue.

Is witness, compelled to answer, protected?

If the witness, either of his own accord or being compelled by the Court, answer a question which is irrelevant, or which is relevant only in so for as it affects his credit, and if such question criminate him or expose him to a penalty or forfeiture, is he entitled to the protection afforded by Section 132, *ante*, page 445? Apparently he is not. But it is submitted that at least where he is compelled to answer, such protection should be extended to him.

Read in connection with this Section para. 3 of Section 165, *post*.

With reference to clause (2) it may be observed that where the facts, which form the subject of the question, are comparatively *recent*, they are more or less important as bearing upon the moral principles of the

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[1] If these words be treated as a *proviso* to the Section, the result will be that the Court has a discretion to compel an answer to any irrelevant question; but where such question affects the witness's character, the Court has no discretion, and the witness must answer. Such, however, is clearly not the interpretation to be put upon the Section.

witness was constituted at the time of his examination; but it is otherwise where the facts are of remote date, "for the interests of justice," says Mr. Taylor, "can seldom require that the errors of a man's life, long since repented of, and forgiven by the community, should be recalled to remembrance at the pleasure of any future litigant."[1]

With reference to clause (4), see Illustration (*h*), Section 114, *ante*, and also the other matter which may be considered in connection with the same Illustration, *ante*, page 388. Mr. Taylor observes as follows:—"It has been stated more than once, that, if the witness declines to answer, no inference of the truth of the fact can be drawn from that circumstance; but the soundness of this rule is very questionable; and although it would be going too far to say that the guilt of the witness *must* be implied from his silence, it would seem that, in accordance with justice and reason, the jury should be at full liberty to consider that circumstance, as well as every other, when they come to decide on the credit due to the witness. A perfectly honorable but excitable man may occasionally repudiate a question which he regards as an insult, and to infer dishonor from his conduct would, of course, be unjust: but, generally speaking, an honest witness will be eager to rescue his character from suspicion and will at once deny the imputation, rather than rely on his legal rights, and refuse to answer the offensive interrogatory."[2]]

Question not to be asked without reasonable grounds.

149. No such question as is referred to in section one hundred and forty-eight ought to be asked, unless the person asking it has reasonable grounds for thinking that the imputation which it conveys is well-founded.

Illustrations.

(*a.*) A barrister is instructed by an attorney or vakil that an important witness is a dacoit. This is a reasonable ground for asking the witness whether he is a dacoit.

(*b.*) A pleader is informed by a person in Court that an important witness is a dacoit. The informant on being questioned by the pleader gives satisfactory reasons for his

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[1] It may be observed that it may amount to *defamation* in India and to libel in England to publish even the truth about a person when the truth is so old that it cannot be for the public good that it be made known. See Exception 1 to Section 499 of the Indian Penal Code: and 6 & 7 Vict., Cap, 96, Sec. 6.

[2] § 1321.

statement. This is a reasonable ground for asking the witness whether he is a dacoit.

(*c.*) A witness, of whom nothing whatever is known, is asked at random whether he is a dacoit. There are here no reasonable grounds for the question.

(*d.*) A witness, of whom nothing whatever is known, being questioned as to his mode of life and means of living, gives unsatisfactory answers. This may be a reasonable ground for asking him if he is a dacoit.

Procedure of Court in case of question being asked without reasonable grounds.

150. If the Court is of opinion that any such question was asked without reasonable grounds, it may, if it was asked by any barrister, pleader, vakíl or attorney, report the circumstances of the case to the High Court or other authority to which such barrister, pleader, vakil or attorney is subject in the exercise of his profession.

History of these Sections.

[These Sections were substituted while the Bill was in Committee for certain other Sections in the original draft, which, said Mr. Stephen in his speech on the passing of the Bill, "provided, in substance, that no person should be asked a question which reflected on his character, as to matters irrelevant to the case before the Court, without written instructions; that if the Court considered the question improper, it might require the production of the instructions; and that the giving of such instructions should be an act of defamation, subject, of course, to the various rules about defamation laid down in the Penal Code. To ask such questions without instructions was to be a contempt of Court in the person asking them, but was not to be defamation." Mr. Stephen proceeded to remark—"This proposal caused a great deal of criticism, and in particular produced memorials from the Bars of the three Presidencies. It was also objected to by most of the Local Governments to whom the Bill was referred for opinion. Some of the objections made to the proposals were, I thought, well founded. It was pointed out, in the first place, that the difficulty of obtaining the written instructions would be practically insuperable; in the next place, that the Native Bar throughout the country were already subject to forms of discipline which were practically sufficient; and, in the third place, and perhaps this was the most important argument of all—that, in this country, the administration of justice is carried on under so many difficulties, and is so frequently abused to purposes of the worst kind, that it is of the greatest importance that the character of witnesses

should be open to full inquiry. These reasons satisfied the Committee, and myself amongst the rest, that the Sections proposed would be inexpedient, and others have accordingly been substituted for them which I think will in practice be found sufficient." Speaking, then, of the substituted Sections, including Sections 146 to 152, he said, "the object of these Sections is to lay down, in the most distinct manner, the duty of counsel of all grades in examining witnesses with a view to shaking their credit by damaging their character. I trust that this explicit statement of the principles according to which such questions ought or ought not to be asked, will be found sufficient to prevent the growth, in this country, of that which in England has on many occasions been a grave scandal. I think that the Sections, as far as their substance is concerned, speak for themselves, and that they will be admitted to be sound by all honorable advocates and by the public." [1]

See para. 3, Section 165, *post*.]

Indecent and scandalous questions.

151. The Court may forbid any questions or inquiries which it regards as indecent or scandalous, although such questions or inquiries may have some bearing on the questions before the Court, unless they relate to facts in issue, or to matters necessary to be known in order to determine whether or not the facts in issue existed.

Questions intended to insult or annoy.

152. The Court shall forbid any question which appears to it to be intended to insult or annoy, or which, though proper in itself, appears to the Court needlessly offensive in form.

[See after Sections 148 and 150, *ante*, pages 484-5 and 486-7. These Sections are in general accord with English law, which is, however, not quite settled on the subject of *degrading* questions. The result of Section 151 will be that the Court cannot forbid *indecent* or *scandalous* questions, if they *relate to facts in issue, or to matters necessary to be known in order to determine whether or not the facts in issue existed.* If they have, however, merely *some bearing on the questions before the Court*, the Court has a discretion, and *may* forbid them. "If a woman," says Mr. Stephen, in his *General View of the Criminal Law of England*, "prosecuted a man for picking her pocket, it would be monstrous to inquire whether she had not had an illegitimate child ten years before,

[1] *Proceedings of the Legislative Council of India*, pages 237—238 of the *Supplement to the Gazette of India* of 30th March 1872.

though circumstances *might* exist which might render such an enquiry necessary. For instance, she might owe a grudge to the person against whom the charge was brought on account of circumstances connected with such a transaction, and have invented the charge for that reason."[1]

Where a question is intended to *insult* or *annoy* or is *needlessly offensive in form*, it is made the duty of the Court to interpose for the protection of the witness.]

Exclusion of evidence to contradict answers to questions testing veracity.

153. When a witness has been asked and has answered any question which is relevant to the inquiry only in so far as it tends to shake his credit by injuring his character, no evidence shall be given to contradict him; but if he answers falsely, he may afterwards be charged with giving false evidence.

Exception 1.—If a witness is asked whether he has been previously convicted of any crime and denies it, evidence may be given of his previous conviction.

Exception 2.—If a witness is asked any question tending to impeach his impartiality and answers it by denying the facts suggested, he may be contradicted.

Illustrations.

(*a.*) A claim against an underwriter is resisted on the ground of fraud.

The claimant is asked whether, in a former transaction, he had not made a fraudulent claim. He denies it.

Evidence is offered to show that he did make such a claim.

The evidence is inadmissible.

(*b.*) A witness is asked whether he was not dismissed from a situation for dishonesty. He denies it.

Evidence is offered to show that he was dismissed for dishonesty.

The evidence is not admissible.

(*c.*) A affirms that on a certain day he saw B at Lahore.

A is asked whether he himself was not on that day at Calcutta. He denies it.

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[1] Pages 297, 298.

Evidence is offered to show that A was on that day at Calcutta.

The evidence is admissible, not as contradicting A on a fact which affects his credit, but as contradicting the alleged fact that B was seen on the day in question in Lahore.

In each of these cases the witness might, if his denial was false, be charged with giving false evidence.

(*d.*) A is asked whether his family has not had a blood feud with the family of B, against whom he gives evidence. He denies it. He may be contradicted on the ground that the question tends to impeach his impartiality.

["With respect to all questions put to a witness on cross-examination for the purpose of directly testing his credit, it may be broadly laid down," says Mr. Taylor, "that if the questions relate to *relevant* facts, the answers may be contradicted by independent evidence; if to *irrelevant*, they cannot."[1] The Indian Evidence Act does not lay down this rule anywhere in so many words; but the provisions of the Act as to *relevancy* and other matters necessarily involve the rule (see *ante*, page 484). Mr. Taylor further remarks that inquiries respecting the previous conduct of the witness will almost invariably be regarded as irrelevant, provided such conduct be not connected with the cause or the parties.[2] The Indian Evidence Act adopts the same principle. The Exceptions to the rule contained in the above Section are taken from English law—the *first* from the 25th Section of the Common Law Procedure Act,[3] 1854, which enacts that a witness may be questioned as to whether he has been convicted of any felony or misdemeanour, and, upon being so questioned, if he either denies the fact or refuses to answer, it shall be lawful for the opposite party to prove such conviction;[4] the *second* being in accordance with a strongly intimated opinion of the Barons of the Exchequer in the case of *The Attorney-General* v. *Hitchcock*.[5]

Consider in connection with this Section *Illustrations* (*n*) and (*o*) to Section 14, and Section 15, *ante*, page 92.]

Question by party to his own witness.

154. The Court may in its discretion permit the person who calls a witness to put any questions to him which might be put in cross-examination by the adverse party.

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[1] § 1295. [2] § 1295. [3] 17 & 18 Vict., Cap. 128.

[4] The rest of this Section relates to the mode of proving the conviction by a certificate, as to which, in India, see *ante*, page 217.

[5] 1 Welsby, Hurlestone, and Gordon's Rep., 94—102.

[In the exercise of the discretion here conferred, the Court will properly allow such questions to be put, when a witness unexpectedly turns out to be hostile to the party who calls him, or is manifestly interested for the other party, or is unwilling to give evidence ; or if the witness stand in a situation which naturally makes him adverse to the party who desires his testimony, as, for example, a defendant called as the plaintiff's witness, or a plaintiff called as the defendant's witness.

In America a rule prevails which is the converse of the above. A Judge may, in his discretion, prohibit leading questions from being put to an adversary's witness who shows a strong interest or bias in favor of the cross-examining party, and needs only an intimation to say whatever is most favorable to his cause. The Indian Evidence Act does not contain any similar provision.]

Impeaching credit of witness.

155. The credit of a witness may be impeached in the following ways by the adverse party, or, with the consent of the Court, by the party who calls him :—

(1.) By the evidence of persons who testify that they, from their knowledge of the witness, believe him to be unworthy of credit ;

(2.) By proof that the witness has been bribed or has [accepted[1]] the offer of a bribe, or has received any other corrupt inducement to give his evidence ;

(3.) By proof of former statements inconsistent with any part of his evidence which is liable to be contradicted ;

(4.) When a man is prosecuted for rape or an attempt to ravish, it may be shown that the prosecutrix was of generally immoral character.

Explanation.—A witness declaring another witness to be unworthy of credit may not, upon his examination-in-chief, give reasons for his belief, but he may be asked his reasons in cross-examination, and the answers which he gives cannot be contradicted, though, if they are false, he may afterwards be charged with giving false evidence.

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[1] The word in brackets was substituted for "had" by Section 11 of the amending Act XVIII of 1872.

Illustrations.

(*a.*) A sues B for the price of goods sold and deliverd to B. C says that he delivered the goods to B.

Evidence is offered to show that, on a previous occasion, he said that he had not delivered the goods to B.

The evidence is admissible.

(*b.*) A is indicted for the murder of B.

C says that B, when dying, declared that A had given B the wound of which he died.

Evidence is offered to show that, on a previous occasion, C said that the wound was not given by A or in his presence.

The evidence is admissible.

[The *Explanation* should be read with paragraph 1 of the Section. The rule contained in paragraph 2 is derived from the case of *The Attorney-General* v. *Hitchcock*,[1] in which a witness who had given material evidence for the Crown on the trial of an information under the revenue laws was asked on cross-examination, whether he had not *said* that the officers of the Crown had *offered* him £20 to give that evidence. He denied that he had ever said so, and the Court held that evidence was not admissible to contradict him. The mere offer of a bribe, if unaccepted, could not fairly have been held to prejudice the witness's character. Had the statement been that he had *received* a bribe, the case would have been wholly different: the point would have been clearly material to the witness's credit, and so the Evidence Act has regarded it. See in connection *Exception* 2 to Section 153. With respect to paragraph 3, see *ante*, pages 484, 489, as to certain portions of a witness's evidence liable to be contradicted.[2] The rules on this subject, as contained in the Indian Evidence Act, are, generally speaking, the same as those of English law. The following case is valuable as showing the limit of these rules. On a trial for rape in Ireland, a witness was called for the prisoner, who, professing his ignorance of English, was sworn in Irish, and had the advantage (important to a dishonest witness) of giving his evidence through an interpreter. He was pressed in cross-examination as to his knowledge of English, and was asked if he had not recently spoken English to two persons present in Court. He denied it—and it was held by seven, out of ten Judges, that these two persons could not be called to contradict him.[3]

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[1] 1 Welsby, Hurlestone, and Gordon's Rep, 91.

[2] All *relevant* evidence is, of course, liable to be contradicted.

[3] *R.* v. *Burke*, 8 Cox's Criminal Cases, 44.

The credit of a witness may be impeached not only by the adverse party, but also, *with the consent of the Court, by the party who calls him.* This provision is connected with that contained in the previous Section, which allows a party under certain circumstances to cross-examine his own witness. "The question how far a party is at liberty to discredit his own witness," says Mr. Taylor, "is one which for years has been agitated in Westminster Hall, and which at length has been settled by the Legislature. The Common Law Procedure Act of 1854 contains, in § 22, the following salutary, though ill-drawn, enactment on this subject: 'A party producing a witness shall not be allowed to 'impeach his credit by *general evidence* of bad character, but he may, 'in case the witness shall, in the opinion of the Judge, prove adverse, '(*i. e.*, *hostile* as contradistinguished from being merely *unfavorable*), 'contradict him by other evidence, or by leave of the Judge, prove that 'he has made at other times a statement inconsistent with his present 'testimony; but before such last-mentioned proof can be given, the 'circumstances of the supposed statement, sufficient to designate the 'particular occasion, must be mentioned to the witness, and he must be 'asked whether or not he has made such statement.' This enactment has been in great part borrowed from the New York Civil Code. In India proof may be given of former statements made by the witness and inconsistent with any part of his evidence which is liable to be contradicted. If such statements were made in writing or reduced into writing, the witness's attention must have been called to those parts of it which are to be used for the purpose of contradicting him, before such proof can be given (Section 145, *ante*, page 478). If they are verbal merely, and not in writing, there is no similar restriction in the Indian Evidence Act.

When party may discredit his own witness.

"It occasionally happens," says Mr. Day (Common Law Practice, p. 203), "that a witness called under a belief that he will prove a certain fact, turns round upon the party calling him, and proves directly the reverse. The party calling the witness was *not precluded from proving by other testimony what the witness had negatived: but whether he ought to be allowed to discredit his own witness*, either by impeaching his character or by showing that he had previously made statements at variance with the evidence given by him was a point upon which the decisions of the Courts were conflicting." That evidence to discredit ought to be admitted under such circumstances was strongly argued by Lord Denman in the case of *Wright* v. *Beckett* (1 Moody and Robinson's Rep. 414). "If," said His Lordship, "the witness professing to be mine has been bribed by my adversary to deceive me,—if, having taught me to expect the truth from him, he is induced by malice or corruption to turn round upon me with a newly-invented falsehood

which defeats my just right, and throws discredit on all my other witnesses, must I be prevented from showing the jury facts like these? Suppose that, in some dispute happening in the street, a bystander declares his name to one of the contending parties, and his readiness to prove his conduct blameless, but when sworn in open Court takes part with his adversary. The question then is, whether *he* is to be believed or the *other witnesses* of the same party. Some one in Court happens to know him and whispers to the attorney—'He has deceived you in every way: he has given you a false name; he is the adversary's brother and partner: moreover, he has been for years notoriously infamous.' Or suppose such a trial for misdemeanour as some that have lately revolted the public mind; and that some stranger after voluntarily offering his testimony to a calumniated man, should unexpectedly side with his false accuser. If the rule against discrediting your own witness must be strictly construed, these deceptions cannot be exposed. You will be told that you have called him; you must take him for better and for worse, and must be bound by all his statements. Or, if you are permitted, by reason of your late discovery of these facts, to prove them for your own necessary protection, this must be because the rule cannot apply to a case where such facts are brought to your knowledge after you have placed him in the witness-box. The rule, therefore, is limited by that condition; and you shall be at liberty to discredit your witness by such evidence, because you have been deceived and surprised. Can any reason then be assigned, why, when equally deceived by his denying to-day what he asserted yesterday, you should be excluded from showing the contradiction into which, from whatever motive, he has fallen. It is clear that, in civil cases the exclusion might produce great injustice and in criminal cases improper acquittals and fraudulent convictions." These arguments convinced the English Law Commissioners of 1850.]

Questions tending to corroborate evidence of relevant fact, admissible.

156. When a witness whom it is intended to corroborate gives evidence of any relevant fact, he may be questioned as to any other circumstances which he observed at or near to the time or place at which such relevant fact occurred, if the Court is of opinion that such circumstances, if proved, would corroborate the testimony of the witness as to the relevant fact which he testifies.

Illustration.

A, an accomplice, gives an account of a robbery in which he took part. He describes various incidents unconnected

with the robbery which occurred on his way to and from the place where it was committed.

Independent evidence of these facts may be given in order to corroborate his evidence as to the robbery itself.

[See the case of the *Queen* v. *Mohesh Bishwass*, XIX W. R. Crim. Rul. 16.]

Former statements of witness may be proved to corroborate later testimony as to same fact.

157. In order to corroborate the testimony of a witness, any former statement made by such witness relating to the same fact, at or about the time when the fact took place, or before any authority legally competent to investigate the fact, may be proved.

[According to the practice in England, evidence of prior statements is not generally admissible to corroborate a witness. "His having given a contrary account," says Mr. Starkie, "although not upon oath, necessarily impeaches either his veracity or his memory; but *his having asserted the same thing* does not in general carry his credibility further than, nor so far as, his oath."[1] Chief Baron Gilbert was, however, of opinion, that the party who called a witness, against whom contradictory statements had been proved, might show that he had affirmed the same thing before on other occasions, and that he was therefore '*consistent with himself*,'[2] and this opinion was followed in Section 31 of the repealed Act, II of 1855, the provisions of which have been simplified and reproduced in the above Section. The statement, which may be proved under the Section in order to corroborate, may be a statement made either on oath or otherwise, and either in ordinary conversation or before some person who had authority to question the person who made it. It may also be verbal or in writing. If not made before any person legally competent to investigate the fact, it would seem that it must have been made *at or about the time when the fact took place*. In India, perhaps more particularly than in other countries, the statements made by those who have knowledge of the circumstances connected with the commission of an offence, immediately after the occurrence and before they can be tampered with by the Police or others, are important to the ascertainment of truth.

See *Illustrations* (*j*) and (*k*) to Section 8, *ante*, page 82.]

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[1] Starkie on Evidence, page 253.

[2] Gilbert on Evidence, page 135.

158. Whenever any statement, relevant under section thirty-two or thirty-three, is proved, all matters may be proved, either in order to contradict or to corroborate it, or in order to impeach or confirm the credit of the person by whom it was made, which might have been proved if that person had been called as a witness and had denied upon cross-examination the truth of the matter suggested.

What matters may be proved in connection with proved statement relevant under Section 32 or 33.

159. A witness may, while under examination, refresh his memory by referring to any writing made by himself at the time of the transaction concerning which he is questioned, or so soon afterwards that the Court considers it likely that the transaction was at that time fresh in his memory.

Refreshing memory.

The witness may also refer to any such writing made by any other person, and read by the witness within the time aforesaid, if when he read it he knew it to be correct.

Whenever a witness may refresh his memory by reference to any document, he may, with the permission of the Court, refer to a copy of such document: Provided the Court be satisfied that there is sufficient reason for the non-production of the original.

When witness may use copy of document to refresh memory.

An expert may refresh his memory by reference to professional treaties.[1]

160. A witness may also testify to facts mentioned in any such document as is mentioned in section one hundred and fifty-nine, although he has no specific recollection of the facts themselves, if he is sure that the facts were correctly recorded in the document.

Testimony to facts stated in document mentioned in Section 159.

[1] *Sic* in Gazette, but evidently a mistake for *treatises*.

Illustration.

A book-keeper may testify to facts recorded by him in books regularly kept in the course of business, if he knows that the books were correctly kept, although he has forgotten the particular transactions entered.

Right of adverse party as to writing used to refresh memory.

161. Any writing referred to under the provisions of the two last preceding sections must be produced and shown to the adverse party if he requires it; such party may, if he pleases, cross-examine the witness thereupon.

[The committing of a statement of any kind to writing, as remarked by Mr. Bentham, calls forth unavoidably a greater degree of attention than the exhibition of it *vivâ voce* in the way of ordinary conversation. If this be done honestly at the time of the occurrence, which forms the subject of the statement, or so soon afterwards that the incidents must have been fresh in the writer's memory, the writing is a most reliable means of preserving the truth—more reliable than "slippery memory." It is not necessary that the witness, after having seen the writing, should have any *independent or specific recollection* of the facts stated therein. It will be sufficient if he remembers that he has seen the paper before, and is sure that when he saw it, the *facts were correctly recorded therein* (Section 160). In England it has even been held to be sufficient if the witness, having no recollection of the circumstances, or of having before seen the paper, can recognize his signature or writing, and so vouch for the accuracy of the memorandum. These points, though they do not affect the *admissibility* of the evidence, must yet be considered in deciding on the amount of *value* to be assigned to it. Where the witness had become *blind* since the writing was made, it was held that it might be read over to him. A writing used to refresh the memory of a witness does not thereby itself become evidence. It is not necessary, therefore, that the writing should be *admissible* in evidence in order to be so used. Thus, a receipt, which cannot be put in for want of a stamp, may be used by a witness to refresh his memory. Section 159 substantially follows the English rule as *to the time when the writing must have been made*, [illegible] a writing can be used to refresh the memory of a witness only where it has been made or its accuracy recognized *at the time of the fact in question, or, at furthest, so recently afterwards as to render it probable that the memory of the witness had not then become defective.* In one case a witness was not allowed to look at notes, prepared some weeks

Rules as to refreshing memory discussed.

after the transaction, and when he had reason to believe that he would be called upon to give evidence. If the memoranda were prepared subsequently to the event at the instance of the party calling the witness, they would be inadmissible, for otherwise a door might be opened to the greatest fraud. Under Indian, as well as English law, the writing may have been made by *some other person*, provided the witness examined it and knew it to be correct when the facts were fresh in his mind. Thus a witness at Sessions might be shown his former deposition before the committing Magistrate, in order to refresh his memory, a couple of months after, if such first deposition were taken immediately after the occurrence. A Police officer, called as a witness to prove facts seen or discovered during his investigation, may look at notes of the investigation made by himself or another Police officer who accompanied him, though such notes would of themselves be inadmissible in evidence (see Section 119 of the Code of Criminal Procedure, and as to Police Diaries, Section 126 of the same Code, *ante*, page 481).

"Whether the witness can refresh his memory by reference to a mere copy of his original memorandum, is," says Mr. Taylor, "a question of some difficulty and doubt. In several cases he has been allowed to do so, where, having looked at the copy, he was enabled *to swear positively to the facts from his own recollection:* but here it must be presumed, though some of the reports are silent on the subject, that the copy was made from the notes of the witness either by himself, or by some person in his presence, or at least in such a manner as to enable the witness to swear to its accuracy. Even then it may be questionable whether the copy should be used, so long as the original is in existence and its absence unexplained; for there is much weight in the remark[1] of Mr. Justice Patteson, that the rule requiring the production of the best evidence is equally applicable, whether a paper be produced as evidence in itself or be merely used to refresh the memory. Be this as it may, thus much seems clear, that if the copy be an imperfect extract, or be not proved to be a correct copy, or if the witness *have no independent recollection* of the facts narrated therein, the original must be used. The case of *Burton* v. *Plummer* in no way contravenes this rule. There, the plaintiff's clerk being called to prove the order and delivery of certain goods, sought to refresh his memory by some entries in a *ledger*. The transactions in trade had been noted by a clerk in a waste-book as they occurred, and the plaintiff, day by day, had copied the entries into the ledger, each entry being at the same time checked by the clerk. Under these circumstances the Court very properly regarded the ledger as an

Use of a copy to refresh memory.

[1] In *Burton* v. *Plummer*, 2 Adolphus and Ellis's Rep. 344.

original and allowed the witness to refresh his memory thereby, without accounting for the absence of the waste-book. So, in *Horne* v. *Mackenzie*,[1] where a surveyor was permitted to refresh his memory by a printed copy of a report furnished by him to his employers and compiled from his original notes, of which it was substantially though not verbally a transcript, the report seems to have been treated in the light of an original document; and although it contained some marginal notes, made only two days before, it was still allowed to be used, these notes consisting of mere calculations, which the witness, if time were given him, could repeat without their aid. (§§ 1265, 1266.)

It is to be observed that Section 160 above, while it allows a document to be used to refresh the memory where the witness has no *specific recollection of the facts themselves*, is silent as to the use of a *copy* in this particular case.

Right of opposite party to see document.

The writing must be produced and shown to the adverse party, if he requires it, and such party may, if he pleases, cross-examine the witness upon it. The rule of English law is similar, and the adverse party by looking at the writing or examining the witness respecting the entries which *he has used* to refresh his memory, does not adopt the document as part of his evidence. But it might be otherwise if he were to ask questions as to other parts of the document. If the paper fail to refresh the witness's memory, it has been held that the adverse party is not entitled to look at it, and if he do so, he may be required to put it in as evidence.

Provisions of New York Civil Code.

Paragraph 1843 of the New York Civil Code contains provisions very similar to the above. "A witness is allowed to refresh his memory respecting a fact, by anything written by himself, or under his direction, at the time when the fact occurred or immediately thereafter or at any other time, when the fact was fresh in his memory, and he knew that the same was correctly stated in writing. But in such case the writing must be produced, and may be seen by the adverse party, who may, if he choose, cross-examine the witness upon it and may read it to the jury. So also, a witness may testify from such writing, though he retain no recollection of the particular facts; but such evidence must be received with caution."

Scotch Law.

Mr. Alison, in his "Practice of the Criminal Law of Scotland," thus explains the Scotch Law on the subject:—"The rule is that notes or memoranda made up by the witness at the moment, or recently after the fact, may be looked to in order to refresh his memory; but if they were made up

[1] 2 Adolphus and Ellis's Rep. 341.

at the distance of weeks or months, thereafter, and still more, if done at the recommendation of one of the parties, they are not admissible. It is accordingly usual to allow witnesses to look to memoranda, made at the time, of dates, distances, and appearances on dead bodies, lists of stolen goods, or the like, before emitting his testimony; or, even to read such notes to the jury as his evidence; he having first sworn that they were made at the time and faithfully done. In regard to lists of stolen goods in particular, it is now the usual practice to have inventories of them made up at the time from the information of the witness in precognition (the preliminary investigation of Indian law), signed by him and libelled on as a production (*i. e.* to be produced as the ground of a charge) at the trial, and he is then desired to read them, or they are read to him, and he swears that they contain a correct list of the stolen articles. In this way much time is saved at the trial and much more correctness and accuracy is obtained than could possibly have been expected if the witness were required to state from memory all the particulars of the stolen articles, at the distance, perhaps of months, from the time when they were lost. With the exception, however, of such memoranda, notes, or inventories made up at the time or shortly after the occasion libelled, a witness is not permitted to refer to a written paper as containing his deposition; for that would annihilate the whole advantages of parol evidence and *vivâ voce* examination, and convert a jury trial into a mere consideration of written instruments. There is one exception, however, properly introduced into this rule, in the case of medical or other scientific reports or certificates, which are lodged in process before the trial and libelled on as productions in the indictment, and which the witness is allowed to read as his deposition to the jury, confirming it at its close by a declaration on his oath that it is a true report. The reason of this exception is founded in the consideration that the medical or other scientific facts or appearances, which are the subject of such a report, are generally so minute and detailed, that they cannot with safety be entrusted to the memory of the witness, but much more reliance may be placed on a report made out by him at the time when the facts or appearances are fresh in his recollection; while, on the other hand, such witnesses have generally no personal interest in the matter, and, from their situation and rank in life, are much less liable to suspicion than those of an inferior class or more intimately connected with the transaction in question. Although, therefore, the scientific witness is always called on to read his report, as affording the best evidence of the appearances he was called on to examine, yet he may be, and generally is, subjected to a further examination by the prosecutor or a cross-examination on the prisoner's part." In India the rule is slightly different though identical in principle. When a dead body is sent to the Civil Surgeon in order

to the making of a *post mortem* examination, a printed form is sent therewith, which the Civil Surgeon fills up on examining the body. This report is not itself legal evidence (II W. R. Crim. Let. 14; VI W. R. Crim. Let. 3); but it is usually placed in the hands of the Civil Surgeon, who refreshes his memory from its contents when giving his evidence.]

Production of documents.

162. A witness summoned to produce a document shall, if it is in his possession or power, bring it to Court, notwithstanding any objection which there may be to its production or to its admissibility. The validity of any such objection shall be decided on by the Court.

The Court, if it sees fit, may inspect the document, unless it refers to matters of State, or take other evidence to enable it to determine on its admissibility.

Translation of documents.

If for such a purpose it is necessary to cause any document to be translated, the Court may, if it thinks fit, direct the translator to keep the contents secret, unless the document is to be given in evidence : and if the interpreter disobeys such direction, he shall be held to have committed an offence under section one hundred and sixty-six of the Indian Penal Code.

[A document would be in the *custody* of a person who held it for another person, the owner thereof; and it might be said to be in the *possession* of either of such persons. It would be in the *power* of any person, who could effect its production, either personally or by means of his agent.

English Law.

The rule of English Law is similarly that when a witness is served with a *subpœna duces tecum* (summons to produce documents), he is bound to attend with the documents demanded therein, if he has them in his possession, and he must leave the question of their actual production to the Judge, who will decide upon the validity of any excuse that may be offered for withholding them. So the fact that the legal custody of the instrument belongs to another person will not authorize a witness to disobey the subpœna, provided the instrument be in his actual possession; but documents filed in a public office are not so in the possession of the

clerk, as to render it necessary or even allowable for him to bring them into Court without the permission of the head of the office.[1]

Validity of objection how determined.

The validity of any such objection, *i. e.*, *made by the person producing the document*, shall be decided on by the Court. The Section does not contemplate the case of objections made by the opposite party, which must be determined by the usual rules. In order to decide on the validity of the objection, *the Court may take other evidence to enable it to determine on its admissibility*. "It frequently happens," says Mr. Taylor, "that the admissibility of a witness or an instrument is found to depend on a disputed fact, in which case all the evidence adduced both to prove and disprove that fact must be received by the Judge, and adjudicated on by him *alone*." (§ 22.) In cases tried with a jury, the province of the Judge in this respect remains the same (see Section 256 of the Code of Criminal Procedure). The Court may, if it sees fit, *inspect the document, unless it refers to matters of State* (see as to such documents, *ante*, pages 431—433). This is scarcely in accordance with the rule in England, where it has been decided that when an attorney claiming the privilege of his client objects to produce a document entrusted to him by such client, the Judge ought not to look at the writing to see whether it is a document which may properly be withheld. There have, however, been cases in which the Judge has inspected documents in order to decide upon their admissibility. If it be objected on the one side that it is impossible for a Judge, who discharges the functions of Judge and jury, to avoid receiving some impression from the document if he *do* look at it, it may be urged on the other side that the rule of inspection provides a safeguard against futile or dishonest objections, and effects a great saving of the time of the Court.

Translation of documents for accused persons.

In connection with the subject of the translation of documents may be noticed Section 340 of the Code of Criminal Procedure, which provides that in cases in which documents are put in for the purpose of *formal proof*, it shall be in the discretion of the Court to interpret to the accused as much thereof as appears necessary. (See also *The Queen* v. *Amírudín*, VII B. L. R. 71.)]

Giving as evidence of document called for and produced on notice.

163. When a party calls for a document which he has given the other party notice to produce, and such document is produced and inspected by the party calling for its production, he is bound

[1] Taylor, § 1121.

to give it as evidence if the party producing it requires him to do so.

["The production of papers upon notice," says Mr. Taylor, "does not make them evidence in the cause, *unless the party calling for them inspects them*, so as to become acquainted with their contents; in which case he is obliged to use them as his evidence, at least if they be in any way material to the issue. The reason for this rule is that it would give an unconscionable advantage to a party, to enable him to pry into the affairs of his adversary, without at the same time subjecting him to the risk of making whatever he inspects evidence for both parties." § 1614.]

Giving as evidence of document production of which was refused on notice.

164. When a party refuses to produce a document which he has had notice to produce, he cannot afterwards use the document as evidence without the consent of the other party or the order of the Court.

Illustration.

A sues B on an agreement and gives B notice to produce it. At the trial, A calls for the document and B refuses to produce it. A gives secondary evidence of its contents. B seeks to produce the document itself to contradict the secondary evidence given by A, or in order to show that the agreement is not stamped. He cannot do so.

Rule of English Law.

["If a party, after notice, declines to produce a document, when formally called upon to do so, he will not afterwards be allowed to change his mind; and, therefore, if he once refuses, he cannot, when his opponent has proved a copy, and is about to have it read, produce the original, and object to its admissibility without the evidence of an attesting witness; neither, after such refusal, will he be permitted to put the document into the hands of his opponent's witnesses for the purpose of cross-examination, or to produce and prove it as part of his own case." Taylor, § 1615.

See Section 66, *ante*, page 285, and Section 89, *ante*, page 306.]

Judge's power to put questions or order production.

165. The Judge may, in order to discover or to obtain proper proof of relevant facts, ask any question he pleases, in any form, at any time, of any witness, or of the parties, about any fact relevant

or irrelevant; and may order the production of any document or thing: and neither the parties nor their agents shall be entitled to make any objection to any such question or order, nor, without the leave of the Court, to cross-examine any witness upon any answer given in reply to any such question.

Provided that the judgment must be based upon facts declared by this Act to be relevant, and duly proved.

Provided also that this section shall not authorise any Judge to compel any witness to answer any question, or to produce any document which such witness would be entitled to refuse to answer or produce under sections one hundred and twenty-one to one hundred and thirty-one both inclusive, if the question were asked or the document were called for by the adverse party; nor shall the Judge ask any question which it would be improper for any other person to ask under sections one hundred and forty-eight and one hundred and forty-nine; nor shall he dispense with primary evidence of any document, except in the cases hereinbefore excepted.

[This is a most important Section. Its provisions, though they may be in some respects not in accordance with English ideas, are wholly suited to the state of things which exists in India out of the Presidency Towns. In his speech on the occasion of the Bill becoming law, Mr. Stephen said as follows:—"I say that, throughout India generally, nothing like the English system under which the Bench and Bar act together and play their respective parts independently does now exist, or can for a length of time be expected to exist. Let me just re-call for a moment the nature of that system. In the first place, the Bench and the Bar in England form substantially one body. The Judges have all been Barristers, and the great prize to which the Barristers look forward is to become Judges. That is not the case in India, nor anything like it. The great mass of Indian Judges are not, and never have been, lawyers at all; the great mass of Indian lawyers have no chance or expectation of becoming Judges, and many of them have no wish to do so. Even in the Presidency Towns, the whole organization of the profession differs

Mr. Stephen's Observations.

from that of England in ways which I do not think it necessary to refer to, but which are of great importance. I may, however, observe that the position of an English Barrister who practises in the Mofussil, whether he is habitually resident in a Presidency Town or not, is altogether different from that of an English Barrister in his ordinary practice in England. An English Barrister on Circuit, and even at the Quarter Sessions, is subject to a whole series of professional restraints and professional rules, which do not, and cannot apply to practice in the Mofussil in this country. He acts under the eyes of a public which takes great interest in his proceedings, and puts a powerful check upon them. He practises in important cases before Judges whom he feels and knows to be his professional superiors, and to whom he is accustomed to defer. No one of these remarks applies to a Barrister from a Presidency practising in the Mofussil. . . . . Passing, however, from the case of English Barristers to the case of pleaders and vakíls, and the Courts before which they practise, I would appeal to every one who has experience of the subject, whether the observations referred to are not strictly true, and whether the main provision founded upon them—the provision which empowers the Court to ask what questions it pleases—is not essential to the administration of justice here. In saying that the Bench and the Bar in England play their respective parts independently, what I mean is that, in England cases are fully prepared for trial before they come into Court, so that the Judge has nothing to do but to sit still and weigh the evidence produced before him. In India, in an enormous mass of cases, this neither is nor can be so. It is absolutely necessary that the Judge should not only hear what is put before him by others, but that he should ascertain by his own inquiries how the facts actually stand. In order to do this, it will frequently be necessary for him to go into matters which are not themselves relevant to the matter in issue, but may lead to something that is, and it is in order to arm Judges with express authority to do this that Section 165, which has been so much objected to, has been framed."[1]

The above Section applies to both civil and criminal proceedings. In criminal proceedings, however, still greater power is given to a Judge in the Mofussil by Section 256 of the Code of Criminal Procedure, which is as follows :—" It is the duty of the Judge to decide all questions of law, and especially all questions as to the relevancy of facts which it is proposed to prove; the admissibility of evidence or the propriety of questions asked by parties or their agents which may arise in the course of the trial ; and, *in his discretion, to prevent the production of*

Duty of Sessions Judge in Criminal Cases.

[1] *Proceedings of the Legislative Council of India*, page 240 of *The Supplement to the Gazette of India* of March 30th, 1872.

inadmissible evidence, whether it is or is not objected to by the parties ;—to decide upon the meaning and construction of all documents given in evidence at the trial ;—to decide upon all matters of fact which it may be necessary to prove in order to enable evidence of particular matters to be given ;—to decide whether any question which arises is for himself or for the jury ; and upon this point his decision shall be final. The Judge may, if he thinks proper, in the course of his summing up, express to the jury his opinion upon any question of fact, or upon any question of mixed law and fact relevant to the proceeding.

Illustrations.

(*a.*) It is proposed to prove a statement made by a person not called as a witness under circumstances which render evidence of his statement admissible.

It is for the Judge and not for the jury to decide whether the existence of those circumstances has been proved.

(*b.*) It is proposed to give secondary evidence of a document, the original of which is alleged to have been lost or destroyed.

It is the duty of the Judge to decide whether the original has been lost or destroyed.

Civil cases are not tried with a jury in any of the Courts in India, the Judge being in all cases judge both of law and of fact, and discharging the functions of both judge and jury. Criminal cases in the Court of Session are tried by jury in any district in which the Local Government has, under the provisions of Section 233 of the Code of Criminal Procedure, directed that the trial of all offences, or of any particular class of offences, shall be by jury. Criminal trials before the Court of Session in which a European (not being a European British-born subject) or an American is the accused person or one of the accused persons, *must* be by jury (Section 234, *idem*). The duty of the jury is thus defined by Section 257 of the Code of Criminal procedure :—" It is the duty of the jury—(1) to decide which view of the facts is true, and then to return the verdict which, under such view, ought, according to the direction of the Judge, to be returned ;—(2) to determine the meaning of all technical terms and words used in an unusual sense which it may be necessary to determine, whether such words occur in documents or not ;—(3) to decide all questions declared by the Indian Penal Code or any other law to be questions of fact ;—(4) to decide whether general indefinite expressions do or do not apply to particular cases, unless such expressions refer to legal procedure, or unless their meaning is ascertained by law, in either of which cases it is the duty of the Judge to decide their meaning.

Duty of Jury.

Illustrations.

(*a.*) A is tried for the murder of B.

It is the duty of the Judge to explain to the jury the distinction between murder and culpable homicide, and to tell them under what views of the facts A ought to be convicted of murder, or of culpable homicide, or to be acquitted.

It is the duty of the jury to decide which view of the facts is true, and to return a verdict in accordance with the direction of the Judge, whether that direction is right or wrong, and whether they do or do not agree with it.

(*b.*) The question is whether a person entertained a reasonable belief on a particular point. Whether work was done with reasonable skill or due diligence.

Each of these is a question for the jury.

As to the power of jurors or assessors to put questions to the witnesses, see Section 166, *post.*

Power of Judge to send for additional witnesses.

We have already seen (*ante*, page 417) that a Judge, *if he think it necessary for the ends of justice*, can, in civil cases, examine any *party* to the suit or inspect any document in his possession or power, of his own accord causing such party to be summoned, if necessary. Section 9 of Act XXIII of 1861 (by which the Code of Civil Procedure was amended) further empowers the Court at any time, if it think it necessary for the ends of justice, to cause *any person other than a party to the suit* to be summoned either to give evidence or to produce any document in his possession. So, a Magistrate, making an inquiry into a case triable by the Court of Session or High Court, may, at any stage of the proceedings, summon and examine any person whose evidence he considers essential to the inquiry, and may re-call and re-examine any person already examined (Section 192 of the Code of Criminal Procedure): and this power is by Section 214 of the same Code extended to a Magistrate trying warrant cases. Section 351 of the same Code further enacts that any Court or Magistrate may, at any stage of any proceeding, inquiry or trial, summon any witness or examine any person in attendance, though not summoned as a witness, and *it shall be its or his duty to do so if the evidence of such person appears essential to the just decision of the case.* In the case of *Tarini Charan Chaudhri* v. *Saroda Sundari Dasi*, III B. L. R. A. J. C. 158, it was decided that when a party to the suit or a witness is summoned by the Court, such witness is liable to be cross-examined by the parties. The cross-examination of a *party* has already been discussed, *ante*, pages 474, 490. Where the witness called by the Court is a person other than a party to the suit, the rule may perhaps be more properly laid down by saying that each party should have the right of cross-examining the witness as to his adversary's case, though both should be precluded from putting

Cross-examination of witnesses called by the Court.

leading questions as to their own, subject, of course, to the usual deviation from the rule allowed in the event of the witness proving especially hostile to either side.[1] The provisions of the present Section, forbidding the cross-examination without the leave of the Court of any witness upon any answer given in reply to a question asked by the Judge, may be held to alter the rule above laid down. They appear, however, to be intended to apply to particular questions asked a witness already before the Court rather than to the whole examination of a witness called by the Court.

Should Judge in Civil Cases reject inadmissible evidence if not objected to by the parties.

We have seen that the law (Section 256 of the Code of Criminal Procedure, *ante*, page 504) expressly makes it the duty of a Sessions Judge in criminal cases to prevent the production of inadmissible evidence, whether it is or is not *objected to by the parties*. The duty of a Judge in civil cases is nowhere laid down so distinctly in this respect; and there may be some doubt as to whether, and, if at all, to what extent, a Judge ought to interfere where no objection is raised by the parties. When the manner in which cases are prepared for trial in the majority of the Courts of original jurisdiction in the Mofussil is considered, and when it is reflected that few of the present practitioners in the Lower Courts have any idea of what is or what is not relevant, it will be apparent that, if the Courts themselves be passive in this respect, the utility of the new Code of Evidence will be seriously impaired. Under the old law, and almost as it were from the necessity of the thing, it was indicated on more than one occasion that the Court had an active duty to perform in respect of the admission and rejection of evidence, and this, wholly irrespective of objections emanating or rather failing to emanate from the parties or their pleaders. The Calcutta High Court laid down the following rule on one point connected with the subject:—"It will be the duty of the Judge to ascertain, by a few questions put to each witness at the proper time, whether he is speaking of matters within his own knowledge, or merely of those which he has heard from others; and, if the former, what are his means of knowledge."[2] In the case of *The Queen* v. *Petambhar Sirdar and others*, VII W. R. Crim. Rul. 25, Markby, J. said:—"The moment a witness commences giving evidence which is inadmissible, he should be stopped by the Court." This no doubt was a criminal case, but the general direction above first quoted was addressed to all Courts, civil and criminal. With respect to the reception of documentary evidence, the same High Court, commenting[3] upon the laxity

[1] See Taylor, § 1290, where a point somewhat analogous is discussed.

[2] Circular No. 31 (Civil Side), dated 13th October, 1863, page 63 of Vol. I of the Author's "*General Rules and Circular Orders.*"

[3] See Circular No. 9 (Civil Side), dated 26th February, 1867, page 189, *idem*.

of practice prevailing in the Mofussil Courts on this head as "being productive of most serious inconvenience, and evincing in many cases total disregard of the wholesome provisions of the law," directed the attention of the lower Courts to those provisions, and amongst others to Section 129 of the Code of Civil Procedure, which enacts that all exhibits produced by the parties shall be received and inspected by the Court; but it shall be competent to the Court, after inspection, to reject any exhibit *which it may consider irrelevant or otherwise inadmissible*, recording the grounds of such rejection. "This," says the circular referred to, "means that the Court is to take care that parties are not allowed to put in exhibits which are (1) irrelevant or (2) inadmissible." Turning now to the new Evidence Act, it will be found that many of its provisions tend to impose an imperative duty upon the Court. The *proviso* to the above Section (165) distinctly declares that the Judge *shall* not dispense with primary evidence of any document except in the cases excepted in the Act. Section 64, *ante*, page 282, enacts that "documents *must* be proved by primary evidence except in the cases hereinafter mentioned." So Section 60, *ante*, page 279, enacts that oral evidence *must*, in all cases whatever, be direct. Then Section 5, *ante*, page 77, enacts that evidence may be given of relevant facts *and of no others*. Having regard to the language of these Sections and of other portions of the Evidence Act, it will be clear that it was the intention of the Legislature that a Civil Court should, irrespective of objections made by parties, compel observance of the provisions of the law. But what if the Court neglect its duty in this respect? In the case of an appeal, are parties, themselves ignorant of the provisions of the law, and unable to procure the services of competent advisers because none such exist on the spot, to suffer for the *laches* of the Court? It may be said that there is no good reason why this particular case should form an exception to the general rule *Ignorantia juris non excusat*. There is also a distinction between cases in which evidence wholly irrelevant has been erroneously admitted, and those cases in which a relevant fact has been improperly allowed to be proved in a manner different from that which the law requires. The whole question will be further considered after Section 167, *post*.

Judge may not try case in which he has an interest.

In connection with the subject of the duty of a Judge may be noticed Section 25 of "The Bengal Civil Courts' Act," VI of 1871, which enacts that no Múnsif, Subordinate Judge, Additional Judge, or District Judge shall try any suit in which he is a party or personally interested, or shall adjudicate upon any proceeding connected with, or arising out of, such suit; and no Subordinate Judge, Additional Judge, or District Judge shall try any appeal against a decree or order passed by himself in another capacity. Similar provisions are contained in

Section 17 of "The Madras Civil Courts' Act," III of 1873. "The Bombay Civil Courts' Act," XIV of 1869, is silent on the subject. A judgment, decree, or order made in violation of the above provisions would be without jurisdiction, and therefore null and void.[1]]

Power of jury or assessors to put questions.

166. In cases tried by jury or with assessors, the jury or assessors may put any questions to the witnesses, through or by leave of the Judge, which the Judge himself might put and which he considers proper.

CHAPTER XI.—OF IMPROPER ADMISSION AND REJECTION OF EVIDENCE.

No new trial for rejection or improper reception of evidence.

167. The improper admission or rejection of evidence shall not be ground of itself for a new trial or reversal of any decision in any case, if it shall appear to the Court, before which such objection is raised, that, independently of the evidence objected to and admitted, there was sufficient evidence to justify the decision, or that, if the rejected evidence had been received, it ought not to have varied the decision.

[This is *verbatim* Section 57 of the old Act, II of 1855: and the rule has been adopted from the practice of the Courts in England. "Where evidence," says Mr. Lush, "has been offered by one party at the trial, and has been improperly rejected or admitted by the Judge after hearing the objections of the opposite party, a new trial, as a general rule, may be claimed on the ground that in so rejecting or admitting the evidence, the Judge did not rule according to law. But still the Courts have not been in the habit of granting a new trial *if, with the evidence rejected, a verdict for the party offering it would be clearly against the weight of evidence; or if, without the evidence received, there be enough to warrant the verdict;*

Rule of English Law.

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[1] As to a Judge having no jurisdiction to try a case in which he has an interest, see *Calcutta Steam Tug Co.* v. *Hag Hoseni Ibrahim Bin Jahur*, Bourke's Rep. O. C. 273: and *Dimes* v. *Proprietors of Grand Junction Canal* (3 H. L. Cases 759), in which the House of Lords reversed a decision of Lord Chancellor Cottenham, because he was a shareholder in the Company to the extent of a few thousand pounds.

yet, unless in a very clear case, the Courts will not thus determine the effect of the improperly rejected evidence, but will direct a new trial."[1] In *R.* v. *Grant*[2] it was laid down that it is only where the evidence in question is deemed by the Court to have been admissible *for the purpose for which it was tendered at the trial*, that its rejection forms a sufficient ground for a new trial: and that a new trial will not be granted in order that evidence may be given for a purpose other than that for which it was offered, for in such case the fault lay with the party and not with the Judge. Where the fault was that of the Judge, it is evident that it would be a fruitless protraction of litigation to grant a new trial in those cases in which it is clear that the Judge's error could have had no possible effect upon the result.[3] It will, however, be well to bear in mind that the English cases were decided under a system different from that which prevails in India, differing more especially in this, that in England the facts are found by a jury, while in India the Judge is judge both of fact and law. Under the former system a new trial might well be granted when the effect of a particular piece of evidence upon a jury might be the subject of reasonable doubt; while under the latter the Judge can himself say what the effect would be upon his own mind. In the case of *Mohur Singh* v. *Ghariba* (before the Privy Council, VI B. L. R., 499) the following observations were made:—"It seems to their Lordships that, giving full weight to all these objections, there is still sufficient and more than sufficient proof in the unsuspected evidence given in the cause to support the decrees against which the appeal is brought. Their Lordships, of course, do not give to a decree founded upon evidence which has been so impeached the same weight which they would give to the finding of an Indian Court upon evidence against which no such objection can be alleged. But they are not in the position of a Court of Law in this country before which, on a motion for a new trial, it is shown that evidence improper to be admitted has been admitted before the jury. The Court in that case are not judges of

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[1] *Stephen's Lush's Common Law Practice*, 2nd edition, p. 481, quoting Alderson B. in *Hughes* v. *Hughes*, 15 Meeson and Welsby's Rep. 701. See also the other cases there cited.

[2] 5 Barnewall and Adolphus's Rep. 1081.

[3] See *Wright* v. *Doe d. Tatham*, 7 Adolphus and Ellis' Rep. 330. Compare 13 and 14 Vict., Cap. 36, Section 45, which enacts for Scotland that "a bill of exceptions shall not be allowed in any cause before the Court of Session, upon the ground of the undue admission of evidence, if in the opinion of the Court the exclusion of such evidence could not have led to a different verdict than that actually pronounced; and it shall not be imperative on the Court to sustain a bill of exceptions on the ground of the undue rejection of documentary evidence, when it shall appear from the documents themselves that they ought not to have affected the result at which the jury by their verdict have arrived.

fact, and are unable to say what weight the jury may have given to the evidence that ought not to have been admitted. *But it is the duty of their Lordships who are judges of the fact in such a case as this to consider whether, throwing aside the evidence which ought not to have been admitted, there still remains sufficient evidence to support the decrees.*" See also *Lalla Banshidar* v. *The Government of Bengal* (before the Privy Council, IX B. L. R., 371).

Duty of Appellate Court when evidence has been improperly admitted by Court of First Instance.

In these words of their Lordships of the Privy Council is indicated very clearly what is the duty of a Court sitting in *regular* appeal, and therefore competent to deal with both facts and law, when evidence has been improperly admitted by the Court of first instance. *It should throw aside the evidence which ought not to have been admitted, and then consider whether there still remains sufficient evidence to support the decree.*[1] Where the evidence which is to be so thrown aside is wholly irrelevant, the case is sufficiently clear. The decree can be supported upon relevant evidence only: and if, after all that is irrelevant has been thrown aside, there does not remain enough that is relevant to support it, the decision must be reversed. The party who is thus defeated may say that if he had known that the evidence given would have been insufficient for the purpose, he could have produced other evidence that would have been sufficient. The answer to this objection is to be found in the following observations of their Lordships of the Privy Council in the case of *Mahárája Kúnwar Nitrásar Singh* v. *Babú Nand Lall and others*, VIII Moo. Ind. Ap. 199:—"The learned counsel for the appellant have not strongly contended that the proper order to be made on this appeal is one remanding the case for re-trial. They have rather insisted that on the materials now before their Lordships, he is entitled to have the decree made in his favor by the Principal Sádr Amín affirmed. Their Lordships, however, desire to observe that in their judgment the majority of the Sádr Court was right in treating the cause as ripe for final decision. The appellant had, at all events from the date of the settlement of the issues, clear notice of what he had to prove. He had been called upon to adduce further evidence on those issues, if he had any to give. He advisedly declined to do so, and called for the judgment of the Court upon the evidence already given. If this manner of trial were irregular, it is not for him to complain of an irregularity committed at

[1] Compare Section 358 of the Code of Civil Procedure, which enacts that when the evidence upon the record of the Lower Court is sufficient to enable the Appellate Court to pronounce a satisfactory judgment, the Appellate Court shall finally determine the case, notwithstanding that the judgment of the Lower Court has proceeded wholly upon some other ground.

his instance or with his consent. *And the suspicion, however probable, of the Judge that a party who has failed to prove his case may be more successful on a second and fuller investigation is no sufficient ground for directing a new trial.*"

Relevant fact improperly proved.

But there is another class of cases, namely, of those in which a fact relevant in itself has been erroneously allowed to be proved in a manner not permitted by the law, as for example, where secondary evidence of the contents of a document has been admitted without the absence of the original having been accounted for. The rule in England is that, unless the opposite party objected to this evidence at the time that it was offered, he cannot object afterwards: and in accordance with this rule, it has been held more than once by the Calcutta High Court that it is not competent to an Appellate Court sitting in regular appeal to reject the *copy* of a document, to the admission of which by the Lower Court no objection was made by any of the parties, although the original was not produced or its non-production not accounted for. In dealing with such a case under the new Evidence Act, it will, as already observed, be necessary to consider the effect of "must" in Section 64, *ante*, page 282: and of the second proviso to Section 165, *ante*, page 503, which enacts that a Judge *shall not* dispense with primary evidence of any document, except in the cases excepted by the Act. The effect of a compulsory Registration Law has been considered, *ante*, page 345 and following pages. It may appear that the language of the Section and of the proviso just quoted is as imperative as that of the Registration Act.

Unstamped or insufficiently stamped documents.

Where documents required by law to be stamped were received by the Court of Original Jurisdiction without a stamp or without a sufficient stamp, it was held that it was not competent to an Appellate Court to reject them (*Lalji Singh* v. *Syad Akram Ser and others*, III B. L., R. 235—Unstamped receipts), or on this account to reverse the decision of the Lower Court[1] (*Mark Ridded Currie* v. *S. V. Mutu Ramen Chetty*, III B. L. R. 130). Both these cases proceeded on the ground that the error of receiving a document insufficiently stamped or without a stamp, does not affect the merits of the case or the jurisdic-

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[1] Compare Section 31 of the Common Law Procedure Act, 1854 (17 & 18 Vic. c. 125) which enacts that "no new trial shall be granted by reason of the ruling of any Judge that the stamp upon any document is sufficient, or that the document does not require a stamp."

tion of the Court,[1] although it may affect the Government revenue. These cases were decided under the old Stamp Act, X of 1862: and are somewhat remarkable, having regard to the imperative provisions of Section 14[2] of that Act, which directed that no instrument chargeable with stamp-duty shall be received in any Court of Justice as creating, transferring, or extinguishing any right or obligation, or as evidence in any civil proceeding, or *shall be acted upon* in any such Court or by any public officer, *unless duly stamped* as required by the Act. This language is not less imperative than that of the Registration Act (see Section 49 thereof, *ante*, page 345), upon which a very different construction has been put. See also *Tetai Abom* v. *Gagai Gura Chawa*, III B. L. R. Appen. 30, in which, however, the document had been objected to in the Court of first instance.

Evidence admitted at an improper stage of case.

Evidence cannot be said to have been improperly admitted merely because it was admitted at an improper stage of the case, unless indeed the other party have been prejudiced by this course (*Doe d. Nicholl* v. *Bower*, 16 Adolphus and Ellis' Rep. 805: *Goshain Tota Ram* v. *Raja Rikmani Ballab*, XIII Moo. Ind. App. 83). It would seem that, if an Appellate Court receive additional evidence without recording the reasons for the admission thereof as required by Section 355 of the Code of Civil Procedure (see *post*, page 514), such evidence so received is to be regarded as improperly admitted (*Maharaja Jagadindra Banwari Gabind Bahadúr* v. *Bhabatarini Dasi*, V B. L. R. App. 54).

Improper rejection of Evidence.

Turning now to the case in which evidence properly receivable has been offered and improperly rejected, the rule here is that the improper rejection is not to be a ground of itself for a new trial or reversal of any decision in any case, if it shall appear to the Court, before which such objection is raised, that, if the rejected evidence has been received, it ought not to have varied the decision. If the Appellate Court is of opinion that the rejected evidence, if received, ought to have varied the decision, it does not follow that it ought to proceed at once to reverse the decision of the Lower Court. It is competent for the superior Court, and in most cases it would be proper, to proceed in the manner provided for in Section 355 of the Code of Civil Procedure—"It

[1] Having advertence to Section 350 of the Code of Civil Procedure, which enacts that "the judgment may be for confirming or reversing or modifying the decree of the Lower Court. But no decree shall be reversed or modified, nor shall any case be remanded to the Lower Court, on account of any error, defect, or irregularity either in the decision or in any interlocutory order passed in the suit not affecting the merits of the case or the jurisdiction of the Court."

[2] Section 18 of the new Act, XVIII of 1869, is similar.

shall not be competent to the parties in an appeal to produce additional evidence in the Appellate Court, whether of exhibits or witnesses; but if it appear that *the Lower Court refused to admit competent evidence*, or if the Appellate Court require any exhibits to be produced or witnesses examined to enable it to pronounce a satisfactory judgment, or for any other substantial cause, the Appellate Court may allow additional exhibits to be received and any necessary witnesses to be examined, whether such witnesses shall have been previously examined in the Court below or not; provided that, whenever additional evidence is admitted by an Appellate Court, the reasons for the admission shall be recorded on the proceedings of such Court."

The above Section (167) of the Indian Evidence Act has been so far considered as applicable to Courts of appeal, to which the words "reversal of any decision" indicate its applicability, inasmuch as a Court of Appeal alone can reverse a decision in India. With regard to a *new trial* it is to be observed that the Code of Civil Procedure does not provide for a new trial. Sections 376 to 380 of this Code provide for a *review of judgment:* and Section 380 enacts that, when an application for a review of judgment is granted, the Court shall give such order in regard to the *rehearing* of the suit as it may deem proper. Whether by this "rehearing" is intended a new trial—a trial *de novo*—including a re-examination of witnesses, or merely a re-arguing and re-consideration of the case, after receiving the additional evidence, the discovery of which since the former trial was the ground of admitting the review —has never been decided that I am aware of. It may be observed that the terms "review" and "rehearing" are borrowed from the practice of the Courts of Chancery in England,[1] which fact would seem to indicate that the second of the courses above-mentioned is what was contemplated. A *new trial* is provided for by Section 21 of the Mofussil Small Cause Court Act, XI of 1865, and by Section 43 of Act IX of 1850 applicable to the Presidency Towns.

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[1] On the subject of reviews the following cases may be usefully referred to:— *Amrao Takur* v. *Gokal Mandal and another*, VIII B. L. R. App. 34 (Review not to be granted without proof of the truth of the ground on which it is asked): *In the matter of the petition of Chintamani Pal and others* (Full Bench), VI B. L. R. 126 (Raising of new point which had not been discussed at the original hearing): *In the matter of the petition of Jadunath Mukherji*, VI B. L. R. 333 (Cannot be admitted by Lower Appellate Court after a special appeal): *Bihari Lall Nandi and others* v. *Srimati Trailakha Mayi Barmani*, III B. L. R. 346 (Grounds for admitting): *Maharajah Moheshur Singh* v. *The Bengal Government*, VII Moo. Ind. Ap, 304 (Distinction between *review* and *appeal*): *Sheikh Gholam Hosen* v. *Okhai Kumar Ghose*, III W. R. Act X Rul. 169 (Judge granting review of predecessor's judgment improperly).

Duty of Appellate Courts.

In connection with the subject of the duty of Appellate Courts, it will be useful to notice a rule established by a long train of decisions of the Judicial Committee of the Privy Council, namely, that their Lordships will not disturb the concurrent decision of two Courts in India upon a question of fact which appears to have been *proved* and diligently investigated in the Courts below, unless it very clearly appears that there has been some miscarriage of justice or some mistrial, or that the conclusion arrived at is very plainly erroneous, *Chandra Maní Debí Chaudhrain* v. *Manmohiní Debya*, VIII Moo. Ind. Ap 489: *Ghulam Múrtúzah Khan Bahadúr* v. *The Government*, IX Moo. Ind. Ap. 478 ("It is not the course of the Committee to disturb the finding of the Courts below upon mere issues of fact, unless it is clearly satisfied that there has been some miscarriage, either in the reception or in the appreciation of evidence. In cases that turn upon the credibility of the testimony given, it is disposed to defer to the judgment of those who, with the advantage of local experience, have had the means of seeing witnesses under examination and of inspecting the original documents"): *Naragunty Latchmídavamah* v. *Vengama Naidú*, IX Moo. Ind. Ap. 87 (It is not the habit of their Lordships, unless in very extraordinary cases, to advise the reversal of a decision of the Courts of India merely on the effect of evidence or the credit due to witnesses. The Judges there have usually better means of determining questions of this description than we can have; and when they have all concurred in opinion, it must be shown very clearly that they were in error in order to induce us to alter their judgment; but in this case we think that the Courts could have come properly to no other conclusion than that at which they arrived"): *Massamat Jariatúla Batúl* v. *Massamat Hoseiní Begum*, XI Moo. Ind. Ap. 208: *Míthan Bíbí* v. *Bashír Khan*, XI Moo. Ind. Ap. 216: *Tariní Charan Banerjí* v. *Maitland*, XI Moo. Ind. Ap. 338: *Goshain Tota Ram* v. *Rajah Ríkmaní Ballab*, XIII Moo. Ind. Ap. 82: *Gobind Sandarí Debí* v. *Jagadamba Debí* VI B. L. R. 171: *Laljí Sahú* v. *The Collector of Tirhút*, VI B. L. R. 652: *Maharaj Kúmar Babú Ganeshwar Singh* v. *Dúrga Dutt and others*, VII B. L. R. 652 ("But their Lordships are clearly of opinion that when the question is one simply of fact, and when, above all things, that question of fact is a question of fact as to *boundaries*, where the local knowledge of local Judges and the observation of the local witnesses are all-important, they would be departing from what has been the practice of this tribunal, if they were to act in opposition to the well-considered judgment of the two Courts from whom the appeal comes. It is admitted, and could not be otherwise than admitted, that there is evidence, which, if believed, would have justified those judgments. Their Lordships are of opinion that the Courts

below were the best tribunal for deciding the question whether the evidence was credible or not, and they would be entirely unwilling to disturb their judgments"): *Lalla Banshídar* v. *The Government of Bengal*, IX B. L. R. 369). The following cases were held not to be within the rule:—*Rangama* v. *Atchama*, IV Moo. Ind. Ap. 1 (Disputed question of adoption): *Haradhan Mukherji* v. *Mathúranath Mukherji and others*, IV Moo. Ind. Ap. 414 (Disputed question of adoption): *Madhú Sudhan Sandyal* v. *Sarúp Chandra Sírkar Chaudrí*, IV Moo. Ind. Ap. 433 ("Both the Courts below have decided against the validity of the instrument; a fact which, considering the advantages the Judges in India generally possess of forming a correct opinion of the probability of the transaction, and in some cases of the credit due to the witnesses, affords a strong presumption in favour of the correctness of their decisions: but *does not, and ought not, to relieve this, the court of last resort, from the duty of examining the whole evidence, and forming for itself an opinion upon the whole case*"): *Tayammaul* v. *Sasha Challa Naiker*, X Moo. Ind. Ap. 436 (Decision founded upon the testimony of a single witness selected by the first court—and no careful weighing of the evidence on both sides): *Rájá Bardakant Rai* v. *Babú Chandra Kúmar Rai*, XII Moo. Ind. Ap. 153 (Facts as found not in truth decisive of the real issue between the parties): *Múlví Syad Azhar Alí* v. *Massamat Bíbí Altaf Fatima and others*, XIII Moo. Ind. Ap. 243 (In coming to the conclusion which their Lordships have come to in this case, they feel that they are not departing from the wholesome rule—that, unless they are clearly satisfied that the finding of two concurrent Courts in India upon a question of fact was wrong, such finding will not be disturbed here. For, if the judgments in the respondents' favour are carefully examined, it will appear either that there has been no finding at all of the facts which it was necessary to find, or that those facts have been found in favour of the appellant"): *Charles Seton Guthrie* v. *Abúl Mazaffar*, VII B. L. R. 640 (High Court had affirmed judgment of Lower Court on facts without giving reasons, merely stating that it saw no reason to differ from the finding of the Zillah Judge).

In the case of *Tayabannissa Bíbí* v. *Kúwar Shám Kishore Rai*, III B. L. R. 627, it was said, referring no doubt to the above cases, that it was the duty of the Lower Appellate Court, as laid down by the Privy Council, not to interfere with the judgment of the first Court until it was perfectly satisfied in its own mind that the conclusion arrived at by the first Court was erroneous: and that, if there was any doubt in the case, the benefit of that doubt ought to be given to the respondent and not to the appellant, for it must be presumed that the judgment of the Lower Court is right until the contrary be shown.

Some other Cases.

In the case of *Goshain Tota Ram* v. *Rajah Rikmani Ballab*, XIII Moo. Ind. Ap. 83, their Lordships of the Privy Council said that they had not been in the habit of determining appeals upon the mere fact that certain evidence may have been improperly admitted—that it had always been the rule of the Committee to do substantial justice between the parties, to take the record as it is sent over, and to see whether there is sufficient evidence on the whole record to justify the conclusion to which the Court below came. See also the observations in the case of *Madhú Súdhan Sandyal* v. *Sarúp Chandra Sirkar Chaudhrí*, IV Moo. Ind. Ap. 433, quoted *ante*, page 62. In the case of *the Bank of Hindústan, China, and Japan* v. *The Eastern Financial Association*, XIII Moo. Ind. Ap. 34, their Lordships, speaking of the exercise by the Courts in India of their discretion in a matter in which they had a discretion by law, said:—"In accordance with the principle upon which this Board has always acted, their Lordships would be extremely reluctant to interfere with the discretion of the Courts in India, where two Courts there had arrived at the same conclusion in such a case as this, unless it could be shown that these Courts had acted upon an erroneous principle. A question respecting such a compromise as that which is now under consideration is one falling in a peculiar manner within the discretion of the Judges before whom it is brought, and in this case that discretion appears to have been exercised with very great caution."

The Calcutta High Court, sitting in special appeal,[1] have remanded the case to be tried over again by the Lower Appellate Court—where important evidence had not been carefully considered by such Court (*Mussamát Digambarí Dasí and others* v. *Kissen Dhar Nandí and others*, I Jur. N. S. 35)—where the Judge of the Lower Appellate Court had not recorded his judgment in the manner required by law, *viz.*, Section 359 of the Code of Civil Procedure, which requires that the judgment contain the point or points for determination, the decision thereupon, and the reasons for such decision (*Tatur Khawas* v. *Jagannath Persad*, VII B. L. R. Appen. 15)—where the Lower Appellate Court had clearly dealt with the evidence in an improper manner (*Ramdas Saha* v. *Manmahini Dasí*, VII B. L. R. Appen. 4; *Ganí Biswass* v. *Srígopal Paul Chaudhrí*,

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[1] Section 372 of the Code of Civil Procedure enacts that "unless otherwise provided by any law for the time being in force, a *special appeal* shall lie to the Sádr Court from all decisions passed in regular appeal by the Courts subordinate to the Sádr Court, *on the ground of the decision being contrary to some law or usage having the force of law, or of a substantial error or defect in law in the procedure or investigation of the case which may have produced error or defect in the decision of the case upon the merits, and on no other ground.*"

VIII W. R. Civ. Rul. 395)—and where a fact had been found by the Lower Court upon evidence, part of which was inadmissible (*Gúrúdass Dey* v. *Sambhúnath Chakrvartti*, III B. L. R. 259). It will be an error in law within the meaning of Section 372 of the Code of Civil Procedure if the Lower Court find on no evidence or on what is not legal evidence (*Ram Sudhan Sirkar* v. *Kistobag Bag*, Marsh. Rep. 322)—if secondary evidence has been improperly admitted in the place of primary (*Chandra Kant Ghose and another* v. *Saudamaní Debí and others*, IX W. R. Civ. Rul. 517)—if the Lower Court has dealt improperly with the presumptions which are raised by law (*Rani Surnamayí* v. *Lachmipat Dugar and others*, IX W. R. Civ. Rul. 338)—or with presumptions of fact (*Nilatachi* v. *Verikatachala Mudalí*, I Mad. H. C. Rep. 131).

The following Sections of the Code of Criminal Procedure, Act X of 1872, define the duties of Appellate Courts exercising criminal jurisdiction:—

Finding or sentence of Criminal Court when reversible by reason of error or defect in charge or proceedings.

"283. No finding or sentence passed by a Court of competent jurisdiction shall be reversed or altered on appeal on account of any error or defect, either in the charge or in the proceedings on or before trial, or *on account of the improper admission or rejection of any evidence*, or by any misdirection in any charge to a jury, *unless such error or defect has occasioned a failure of justice*, either by affecting the due conduct of the prosecution, or by prejudicing the prisoner in his defence.

No irregularity in the proceedings up to trial is a sufficient ground for reversing any judgment, sentence or order made or passed in a trial properly held.

Appellate Court may reduce punishment.

In case the accused person has been sentenced to a larger amount of punishment than could have been awarded for the offence, which, in the judgment of the Appellate Court, is proved by the evidence, the Appellate Court may reduce the punishment within the limits prescribed by the Indian Penal Code or any law for the time being in force for such offence.

Procedure in case of conviction by Court not having jurisdiction.

284. When any Court has convicted a person of an offence not triable by such Court, the Appellate Court shall annul the conviction and sentence of such Court, and direct the trial of the case by a Court of competent jurisdiction."

In connection with Section 283 the following cases, decided upon the corresponding Section of the old Act, are still important:—*The Queen* v. *Mahima Chandra Das*, VI B. L. R. Appen. 112: *The Queen* v. *Elahí Baksh*, V W. R. Crim. Rul. 88.]

SCHEDULE.

Number and year.	Title.	Extent of repeal.
Stat. 26 Geo. III, c. 57.	For the further regulation of the trial of persons accused of certain offences committed in the East Indies; for repealing so much of an Act, made in the twenty-fourth year of the reign of his present Majesty (intituled, An Act for the better regulation and management of the affairs of the East India Company, and of the British possessions in India, and for establishing a Court of judicature for the more speedy and effectual trial of persons accused of offences committed in the East Indies), as requires the servants of the East India Company to deliver inventories of their estates and effects; for rendering the laws more effectual against persons unlawfully resorting to the East Indies; and for the more easy proof, in certain cases, of deeds and writings executed in Great Britain or India.	Section thirty-eight, so far as it relates to Courts of Justice in the East Indies.
Stat. 14 & 15 Vic. c. 99.	To amend the Law of Evidence.	Section eleven and so much of section nineteen as relates to British India.
Act XV of 1852.	To amend the Law of Evidence.	So much as has not been heretofore repealed.[1]

[1] Section 12 is saved by Section 12 of the amending Act, XVIII of 1872; but it will be repealed, if the *Bill* for the Consolidation of the Law relating to Oaths, now before the Council, become law.

SCHEDULE.—*(Continued.)*

Number and year.	Title.	Extent of repeal.
Act XIX of 1853.	To amend the Law of Evidence in the Civil Courts of the East India Company in the Bengal Presidency.	Section nineteen.
Act II of 1855.	For the further improvement of the Law of Evidence.	So much as has not been heretofore repealed.
Act XXV of 1861.	For simplifying the Procedure of the Courts of Criminal Judicature not established by Royal Charter.	Section two hundred and thirty-seven.
Act I of 1868.	The General Clauses Act, 1868.	Sections seven and eight.

ACT XVIII OF 1872.

An Act to amend the Indian Evidence Act, 1872.*

Preamble.

WHEREAS it is expedient to amend the Indian Evidence Act, 1872; It is hereby enacted as follows:—

Short title.

1. This Act may be called "The Indian Evidence Act Amendment Act";

Commencement.

And it shall come into force on the passing thereof.

Amendment of Act I of 1872, section 32, clauses 5 and 6.

2. In section thirty-two of the Indian Evidence Act, 1872, clauses (5) and (6), after the word "relationship," the words "by blood, marriage or adoption" shall be inserted.

Amendment of section 41.

3. In section forty-one of the same Act, lines seventeen, twenty and twenty-three, after the word "judgment," the words "order or decree" shall be inserted.

Amendment of section 45.

4. In section forty-five of the same Act, line five, after the word "art," the words "or in questions as to identity of handwriting" shall be inserted.

Amendment of section 57.

5. In section fifty-seven of the same Act, paragraph (13), after the word "road," the words "on land or at sea" shall be inserted.

Amendment of section 66.

6. In section sixty-six of the same Act, line five, after the word "is," the words "or to his attorney or pleader" shall be inserted.

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* The amendments made by this Act have been introduced into the text of the Evidence Act.

Amendment of section 91.

7. In section ninety-one of the same Act, exception (2), for the words "under the Indian Succession Act," the words "admitted to probate in British India" shall be substituted.

Amendment of section 92.

8. In section ninety-two of the Indian Evidence Act, 1872, proviso (1), for the words "want of failure," the words "want or failure" shall be substituted.

Amendment of section 108.

9. In section one hundred and eight of the same Act, line one, for the word "when" (1) the words "Provided that when" shall be substituted; and in the last line, for the word "on," the words "shifted to" shall be substituted.

Amendment of sections 126 and 128.

10. In section one hundred and twenty-six of the same Act, line twenty-two, and in section one hundred and twenty-eight of the same Act, line six, after the word "barrister," the word "pleader" shall be inserted.

In section one hundred and twenty-six of the same Act, line fifteen, for the word "criminal," the word "illegal" shall be substituted.

Amendment of section 155.

11. In section one hundred and fifty-five of the same Act, paragraph (2), for the word "had," the word "accepted" shall be substituted.

Saving of Act XV of 1852, section 12.

12. Nothing in the Indian Evidence Act, 1872, shall be deemed to affect Act No. XV of 1852 (*to amend the Law of Evidence*), section twelve.

NOTE.—The edition of Act No. I of 1872 above referred to, is that in royal octavo.

SECTIONS 20, 21, 27, AND 28 OF THE "INDIAN LIMITATION ACT," IX OF 1871.

Effect of acknowledgment in writing.

20. *a.* No promise or acknowledgment in respect of a debt or legacy shall take the case out of the operation of this Act, unless such promise or acknowledgment is contained *in some writing signed, before the expiration of the prescribed period, by the party to be charged therewith or by his agent* generally or specially authorized in this behalf.

b. When such writing exists, a new period of limitation, according to the nature of the original liability, shall be computed from the time when the promise or acknowledgment was signed.

c. When the writing containing the promise or acknowledgment is *undated*, oral evidence may be given of the time when it was signed. But when it is alleged to have been *destroyed or lost*, oral evidence of its contents shall not be received.

Explanation 1.—For the purposes of this section, a promise or acknowledgment may be sufficient, though it *omits to specify the exact amount* of the debt or legacy, or avers that the *time for payment or delivery has not yet come*, or is accompanied by a *refusal to pay or deliver*, or is coupled with a claim to a *set-off*, or is addressed to any *person other than the creditor or legatee;*

but it must amount to an *express undertaking* to pay or deliver the debt or legacy or to an *unqualified admission* of the liability as subsisting.

Explanation 2.—Nothing in this section renders *one of several partners or executors chargeable by reason only of a written promise or acknowledgment signed by another of them.*

Illustrations.

Z, a bond-debtor, himself writes a letter promising to pay the debt to his creditor A. Z affixes his *seal*, but does not sign the letter:

Z pays part of the debt and promises orally to pay the rest:

Z publishes an advertisement, requesting his creditors to bring in their claims for examination:

In none of these cases is the debt taken out of the operation of this Act.

Effect of payment of interest as such.

21. When *interest* on a debt or legacy is, before the expiration of the prescribed period, *paid as such* by the person liable to pay the debt or legacy or by his agent generally or specially authorized in this behalf,

Effect of part-payment of principal.

or when *part of the principal* of a debt is, before the expiration of the prescribed period, paid by the debtor or by his agent generally or specially authorized in this behalf,

a new period of limitation, according to the nature of the original liability, shall be computed from the time when the payment was made:

Provided that, *in the case of part-payment of principal*, the debt has arisen from a *contract in writing*, and the fact of the payment appears in the *handwriting of the person making the same, on the instrument, or in his own books or in the books of the creditor.*

[These Sections, 20 and 21, came into operation on the 1st April 1873 (see Section 1 of the Act). Their object and the changes which they introduced will be understood from the following exposition of the law as it stood before that date. Section 4, Act XIV of 1859 enacted as follows:—

Section 4, Act XIV of 1859.

"If in respect of any legacy or debt, the person who, but for the Law of Limitation, would be liable to pay the same, shall have admitted that such debt or legacy or any part thereof is due, *by an acknowledgment in writing signed by him*, a new period of limitation, according to the nature of the original liability, shall be computed from the date of such admission: Provided that, if more than one person be liable, none of them shall become chargeable by reason only of a written acknowledgment signed by another of them.

Lord Tenterden's Act.

This Section was borrowed from Lord Tenterden's Act (9 Geo. IV., cap. 14), which enacts that "in actions of debt or upon the case grounded upon any simple

contract, *no acknowledgment or promise by words only shall be deemed sufficient evidence of a new or continuing contract whereby to take any case out of the enactments*" (*as to limitation, i.e.*) "*or to deprive any party of the benefit thereof, unless such acknowledgment or promise shall be made or contained by or in some writing to be signed by the party chargeable thereby.* . . . . . .
Where there shall be two or more joint-contractors, or executors, or administrators of any contractor, no such joint-contractor, executor, or administrator shall loose the benefit of the said enactments or either of them, so as to be chargeable in respect or by reason only of any written acknowledgment or promise made and signed by any other or others of them: *Provided always that nothing herein contained shall alter or take away or lessen the effect of any payment of any principal or interest made by any person whatever.*" Certain doubts, which arose as to the construction of this enactment, were set at rest by the Mercantile Law Amendment Act of 1856 (19 and 20 Vict., Cap. 97), Section 13 of which declares that "an acknowledgment or promise made or contained by or in a writing signed by an *agent* of the party chargeable thereby, duly authorized to make such acknowledgment or promise, shall have the same effect as if such writing had been signed by the party himself." Section 14 enacts that, "when there shall be two or more co-contractors or *co-debtors*, whether bound or liable jointly only, or jointly and severally, or executors, or administrators of any contractor, no such contractor or co-debtor, executor, or administrator shall lose the benefit of the 'Statutes of Limitation,' so as to be chargeable in respect, or by reason only of payment of any principal, interest, or any other money, by any other or others of such co-contractors or co-debtors, executors or administrators."

19 & 20 Vict., Cap. 97.

Mr. Taylor, with his usual precision, deduces from these enactments certain propositions, which place the whole of the English law on this subject in the clearest light. The substance of these propositions is as follows:—*First*,—The law requires a writing, but the same language which, if spoken before the passing of the Act, would have amounted to an acknowledgment or promise, will have a similar effect, if put in writing. *Secondly*,—The written and signed acknowledgment must amount either to an *express promise to pay* the debt, or to a clear and unqualified admission of a still subsisting liability[1] from which a promise to pay on *request* will be implied by law. *Thirdly*,—A *conditional* promise will not suffice, unless the condition be fulfilled: and the Statute begins to run from its fulfilment. *Fourthly*,—An admis-

Mr. Taylor's nine propositions.

[1] See Explanation 1, Section 20 of the New Act, *ante*, p. 523.

sion to a *stranger* that a sum is due will not suffice,[1] though there is some doubt as to this proposition. *Fifthly*,—A general written promise to pay without specifying any amount,[1] or an absolute admission of *some* debt is sufficient, and the amount may be proved by extrinsic evidence. *Sixthly*,—The writing need not specify the person to whom or the time[2] when it was made. Both these points may be proved by parol. *Seventhly*,—The provision applies to a debt due by an *infant* for *necessaries*. *Eighthly*,—The signature may be attached to any part of the document. *Ninthly*,—The promise or acknowledgment must have been made before action brought.[3] If the admission of the debt be accompanied by a *refusal* to pay it,[1] or by a repudiation of liability (*Narbada Shankar* v. *Rughnath Ishvarjí*, II Bom. Rep. 349), or by a declaration that it had been *paid*, or that there was a *set-off* against it,[1] or that it was *barred* by limitation, it will not be sufficient.

Section 4 of Act XIV of 1859 differed in some respects from the provisions of English Law. In the first place *part-payment* of the interest or principal was not sufficient thereunder to keep alive the right to sue—a rule of the Common Law of England which is especially admitted and saved by the above-quoted enactments. Such a payment was formerly held in India to have no effect, unless accompanied by a written acknowledgment of the debt (*Chamar-úla Sirdar and another* v. *Loknath Haldar*, Sutherland's Small Cause Court Rulings, 40: *Ramnarain Chaudhrí* v. *Bhagwan Jogí and Darik Jogí*, *id.* 92: *Khwaja Mohammed Janula* v. *Venkataráyara*, Madras High Court Reports, Vol. II, 79: *Rájáh Iswárá Dás* v. *Richardson and others*, *id.*, Vol. II, 84). Section 21 of the new Act has now altered the law on this point, though not in conformity with the provisions of the English Statutes.

Admission by Agent.

We have seen above that the Mercantile Amendment Act expressly enacted at home, that an admission by an *agent* would be sufficient; a point about which there had been before considerable doubt. The question was raised and decided under the old Act by the Madras High Court in the case of *Rájah Iswára Dás* v. *Richardson and others*, already quoted. *Bittleston*, *J.* said—"Even if the defendants could for this purpose be treated as having signed as his agents, *signature by an agent* was held insufficient under Statute 9, Geo. IV., and *must be held equally insufficient under the Indian Act.* The Indian Legislature has declined in this respect also to follow the course of recent English Legislation (19 and

[1] It will be sufficient under the New Act. See Explanation 1, Section 20, *ante*, p. 523.

[2] See (c) Section 20 of the New Act, *ante*, p. 523.

[3] Under the new Act, it must have been made before the expiry of the prescribed period of limitation. This is in accordance with the principle that a legal obligation becomes extinct by the extinction of the right of action.

20 Vict., cap. 97, Section 13), whereby the signature of an agent is expressly made sufficient." To the same effect, *Budhú Bhúsun Bose* v. *Enayat Munshí*, VIII W. R. 1. A promise or acknowledgment by an agent generally or specially authorized in this behalf will now be sufficient under Section 20 of the new Act.

It was also held that an acknowledgment by one partner would not bind another partner, who had not signed such acknowledgment (*Khúshal Chand* v. *Palmer*, III, N.-W.-P. Rep. 170). This decision is still law (See Explanation 2 to Section 20, *ante*, p. 523).

Is *indirect* acknowledgment sufficient?

In the case of *Kristna Ram* v. *Hachapa Sugapa* (Madras H. C. Rep., Vol. II., 307), the following memorandum was endorsed on a registered bond, to which limitation was pleaded. "*Payment on account of this up to the* 21*st November* 1858, *the interest was paid in full and Rs.* 107 *on account of principal.*" The Court held this written acknowledgment of *a* debt being due on the bond sufficient to satisfy the Act, which, it was observed, "does not require that the writing should express in terms a direct admission that the debt or part thereof is due, but that it is left for the Court to decide in each case, whether the writing, reasonably construed, contains a sufficient recognition of the debt or any part of it. . . . . This decision is consistent with the principle acted upon in the English decisions as to written acknowledgments since the leading case of *Tanner* v. *Smart*; but in saying this, it is not to be understood that we consider that any acknowledgment which did not come within the rule laid down in those decisions would be insufficient to satisfy the 4th Section of the Act. The present decision proceeds upon the ground that the writing contains an *unqualified admission* of the debt, but we do not mean in any way to say that a distinct admission by an acknowledgment in writing of a debt due and owing would not satisfy the Section, if it were accompanied with any expressions which did not warrant the inference of a promise to pay. *At present we incline to think that such an admission would suffice, even although from the expressions used as to payment, a promise to pay on request would not, according to the English cases, be implied.*" In connection with the last remark it may be observed that the English Statute speaks of an *acknowledgment* or *promise*, the old Indian Act mentioned an *acknowledgment* only, but the new Act has promise or acknowledgment.

The Calcutta High Court refused to follow the case of *Kristna Ram* v. *Hachapa Sugapa*, chiefly on the ground that, as part-payment was under the old Act insufficient to take a debt out of the Statute, the fact of a memorandum of such payment having been made in writing and signed by the defendant could not alter the question; that such a memorandum did not warrant the inference of a promise to pay: that

the Legislature intended to shut out inferences and deductions of all sorts and to admit nothing short of a direct admission in writing; that what was required was an acknowledgment in writing that the debt or part of it is due, not a mere acknowledgment of a fact from which it may be presumed that the debt or part of it is unpaid or due,[1] (*Gora Chand Dutt* v. *Loknath Dutt and others*, VIII W. R. 335). In the case of *Rogers* v. *Montriou* (VII B. L. Rep. 550) an acknowledgment not coming directly from the debtor himself but merely deduced as an inference from the tenor of a serious of letters was held insufficient. In *Harrison and others* v. *Hope*, IX B. L. R. Appen. 43, the acknowledgment was held sufficient, although the letters in which it was contained made no mention of the sum due, nor any promise to pay the sum claimed.

With reference to Mr. Taylor's third proposition, it was held by the Madras High Court in the case of *Young* v. *Mangalapilly Ramaiya* (III Mad. Rep. 308) that a written statement that a sum of money will be payable on the accomplishment of a *condition*, that is, on the happening of an event future and uncertain, is not an acknowledgment of a debt, since there may be a present debt, although there is not a present liability to pay, but there is no debt where the liability is dependent on a condition. This case appears to be still good law.

Promise to stranger.

We have seen above that a promise or acknowledgment to a *stranger* will not satisfy the English Statute, though this proposition is not without doubt; the most recent decisions being, however, in its favor. In the case of *Persád Dás Dutt* v. *Denonath Dey* (II Hyde's Reports, 14), the Calcutta High Court on the Original Side decided that a mere admission in writing to a *third party or stranger*, that a debt is due and still unpaid, did not amount to an "acknowledgment" within the meaning of the Section of the old Indian Act. In the case of *Haro Chandra Rai* v. *Máni Mohini Dasi* (III W. R., Small Cause Court Rulings, p. 6), the same Court, however, decided that an admission of the debt by the debtor in a written communication to her agent was sufficient to take the case out of the Statute. In another case on the Original Side of the High Court (*In the matter of the Ganges Steam Navigation Company, Limited*), Mr. Justice Phear, referring to this case remarked:—"As to the necessity of the admission being made to the *creditor*, I am willing to follow the authority of the case of *Persád Dass* v. *Denonath Dey*, (2 Hyde, 14), where it is laid down that the words of Section 4r equire that the admission of liability should be made to the person to whom

[1] The language of the new Act ought to obviate doubt for the future. See in connection with the subject the important remarks of their Lordships of the Privy Council in the case of *Gopi Kishan Goswámi* v. *Brindaban Chandra Sircar Chowdri and another*, III B. L. Rep., Priv. Coun., 37.

the debt is due. This decision seems to have been arrived at after a considerable discussion by Mr. Justice Levinge of the English cases, and with regard to the cases bearing on the other side, I do not think they are of any importance to invalidate that decision. In the first place, they were decisions on another and differently worded Section of the Act, and besides, I am by no means certain that, in the case of *Haro Chandra Roy* v. *Máni Mohíní Dasí*, there was not evidence of the admission having been made to the person to whom the debt was due. I therefore follow on this point Mr. Justice Levinge's decision in Hyde's Reports, and the result is necessarily that I find Mr. Robertson's claim is barred by the Satute;" (See, however, *Hills* v. *The Government*, IX W. R 1: *Nizamuddín* v. *Mohammad Ali*, IV Mad. Rep. 385: and *Madhusúdhan Chaudhri* v. *Brajanath Chandra*, VI B. L. Rep. 299.) The last two cases decided that the acknowledgment may be sufficient without being made to the creditor. Under the new Act a promise or acknowledgment, though "addressed to any person other than the creditor or legatee," will be sufficient. See Explanation 1 to Section 20, *ante*, page 523. It was held under Section 1, Clause 15, of Act XIV of 1859, that an acknowledgment by a mortgagee of the title of the mortgagor, or of his right of redemption made in a written communication from the mortgagee to a third party, was sufficient. (*Dar Gopal Singh* v. *Kashíram Panday and others*, III W. R. Civ. Rul. 3, and see also *Esrí Singh and others* v. *Biseshur Singh*, IV N-W-P. Rep. 255.)

General Promise.

It was ruled in England that a general written promise to pay (fifth proposition, *ante*), not specifying any amount or an absolute admission of some debt being due, is sufficient, and the amount may be ascertained by extrinsic evidence (*Spong* v. *Wright*, 9 M. and W. 633. See the cases collected, Taylor, § 988, note 2). In the case of *Nobin Chandra Mazimdar* v. *T. J. Kenny* (V W. R. Small Cause Court Rulings 3), decided by the Calcutta High Court, the plaintiff sued for wages relying on the following writing to take the case out of the Statute:—"*Nobin Chandra Mazimdar, you are requested to come and take the salary due to you.*" This was held insufficient as an acknowledgment, the Court remarking—"But in the writing on which plaintiff relied, the defendant did not admit any *particular amount* to be due, nor did he admit wages to be due for *any particular period.* He merely admitted that something was due to the plaintiff for wages on the day when he left his service. *An admission of this indefinite* character could not extend the time from which the period of limitation was to be computed" In the case of *Piyárí Lal Saha* v. *Umesh Chandra Mazimdar and others*, IX W. R. 140, *Peacock, C. J.* remarked that the case of *Nobin Chandra Mazimdar* v. *T. J. Kenny* did not establish the principle that a writing, which does not specify the amount and the debt, is not a binding document; and that

there must be many cases in which a promise to pay a debt would be binding, though the amount of it has not been ascertained at the time.—See also *Sageman* v. *Umesh Chandra Mukhapadya*, XII W. R. Or. Ap. 2, and *Young* v. *Mangalapilly Ramaiya*, III. Mad. Rep., 308. Explanation 1 to Section 20 of the new Act now makes the promise or ackowledgment sufficient, though it *omits to specify* the exact amount of the debt or legacy.

With reference to the *eighth* of Mr. Taylor's propositions, the following remarks of the Madras High Court in the already quoted case of *Khwaja Mohammed Janula* v. *Venkatarâyar* may be noticed:—"It is not, however, we think, necessary that the signature of the party should be formally *subjoined or added* to an acknowledgment written by himself, unless it appears from the writing that such signature was intended, or unless the writing would be incomplete in itself as an admission without a signature, in either of which cases the additional authentication by the party's signature would be necessary. . . . . there may be a sufficient ackowledgment in writing, though the signature of the party is not subjoined or added to the writing." But if there be no signature at all, the acknowledgment will be insufficient (*Ram Narain* v. *Harí Das*, IV N-W-P-Rep. 81); and this is clearly law under the new Act. An acknowledgment in writing, *sealed* but not *signed*, was held not sufficient (*Lachman Persad* v. *Ramzan Alí*, VIII W. R. 513). This decision was appealed and set aside, but the first Illustration to Section 20 restores the law as there laid down.]

Acquisition of right to easements.

27. Where the access and use of light or air to and for any building has been peaceably enjoyed therewith, as an easement, and as of right, without interruption, and for twenty years,

and where any way or watercourse, or the use of any water, or any other easement (whether affirmative or negative) has been peaceably and openly enjoyed by any person claiming title thereto as an easement and as of right, without interruption, and for twenty years,

the right to such access and use of light or air, way, watercourse, use of water, or other easement, shall be absolute and indefeasible.

Each of the said periods of twenty years shall be taken to be a period ending within two years next before the institution of the suit wherein the claim to which such period relates is contested.

Explanation.—Nothing is an interruption within the meaning of this section, unless where there is an actual discontinuance of the possession or enjoyment by reason of an obstruction by the act of some person other than the claimant, and unless such obstruction is submitted to or acquiesced in for one year after the claimant has notice thereof and of the person making or authorizing the same to be made.

Illustrations.

(*a.*)—A suit is brought in 1871 for obstructing a right of way. The defendant admits the obstruction but denies the right of way. The plaintiff proves that the right was peaceably and openly enjoyed by him claiming title thereto as an easement and as of right, without interruption, from 1st January 1850, to 1st January 1870. The plaintiff is entitled to judgment.

(*b.*)—In a like suit also brought in 1871 the plaintiff merely proves that he enjoyed the right in manner aforesaid from 1848 to 1868. The suit shall be dismissed, as no exercise of the right by actual user has been proved to have taken place within two years next before the institution of the suit.

(*c.*)—In a like suit the plaintiff shows that the right was peaceably and openly enjoyed by him for twenty years. The defendant proves that the plaintiff on one occasion during the twenty years had asked his leave to enjoy the right. The suit shall be dismissed.

Exclusion in favour of reversioner of servient tenement.

28. Provided that, when any land or water upon, over or from which any easement (other than the access and use of light or air) has been enjoyed or derived has been held under or by virtue of any interest for life or any term of years exceeding three years from the granting thereof,

the time of the enjoyment of such easement during the continuance of such interest or term, shall be excluded in the computation of the said

last-mentioned period of twenty years, in case the claim is, within three years next after the determination of such interest or term, resisted by the person entitled, on such determination, to the said land or water.

Illustration.

A sues for a declaration that he is entitled to a right of way over B's land. A proves that he has enjoyed the right for twenty-five years; but B shows that during ten of these years C, a deceased Hindú widow, had a life-interest in the land, that on C's death B became entitled to the land, and that within two years after C's death he contested A's claim to the right. The suit must be dismissed, as A, with reference to the provisions of this section, has only proved enjoyment for fifteen years.

[*N. B.*—These Sections (27 and 28) came into force on the first day of July 187, 1See Section 1 of the Act.]

SECTIONS OF THE CODE OF CRIMINAL PROCEDURE (ACT X OF 1872) RELATING TO CONFESSIONS.

No inducement to be offered to confess.

120. No Police officer or other person shall offer any inducement to an accused person by threat or promise or otherwise to make any disclosure or confession, whether such person is under arrest or not.

But no Police officer or other person shall prevent the person arrested, by any caution or otherwise, from making any disclosure which he may be disposed to make of his own free will.

Police not to record statement or confession.

121. No Police officer shall record any statement or any admission or confession of guilt, which may be made before him by a person accused of any offence:

Proviso.

Provided that nothing in this section shall preclude a Police officer from reducing any such statement or admission or confession into writing for his own information

or guidance, or from giving evidence of any dying declaration.

Powers of Magistrates to record statements and confessions.

122. Any Magistrate may record any statement made to him by any person, or any confession made to him by any person, accused of an offence by any Police officer or other person. Such statements shall be recorded in the manner hereinafter prescribed for recording evidence, and such confessions shall be taken in the manner provided in sections three hundred and forty-five and three hundred and forty-six, and shall, when recorded, be forwarded to the Magistrate by whom the case is inquired into or tried. No Magistrate shall record any such confession unless, upon inquiry, he has reason to believe that it was made voluntarily, and he shall make a memorandum at the foot of any such confession to the following effect:—

"I believe that this confession was voluntarily made."

(*Signed*) A. B.,
Magistrate.

Inducements to disclosure or confession.

184. No Police officer or other person shall offer to the person arrested any inducement, by threat or promise or otherwise, to make any disclosure.

But no Police officer or other person shall prevent the person arrested, by any caution or otherwise, from making any disclosure which he may be disposed to make of his own free will.

Examination of accused.

193. The Magistrate may, from time to time, at any stage of the inquiry and without previously warning the accused person, examine him, and put such questions to him as he considers necessary.

The accused person shall not render himself liable to punishment for refusal to answer such questions

or for giving false answers to them, but the Magistrate shall draw such inference as may to him seem just from such refusal.

EXPLANATION.—The answer given by an accused person may be put in evidence against him, not only in the case under inquiry, but also in trials for any other offences which his replies may tend to show he has committed.

[The Section relates to inquiry preliminary to commitment. In connection with the *Explanation*, see the case of *Mangar Bhúyan*, X W. R. Crim. Rul. 56.]

OF THE EXAMINATION OF ACCUSED PERSONS.

Accused may be questioned.

342. In all inquiries and trials a Criminal Court may from time to time and at any stage of the proceedings, put any questions to the accused person which such Court may think proper.

Accused not punishable for refusal to answer.

343. The accused person shall not be liable to any punishment for refusing to answer, or for answering falsely questions asked under section three hundred and forty-two, but the Court shall draw such inferences as seems just from such refusal.

No influence to be used to induce disclosures.

344. Except as is provided in section three hundred and forty-seven, no influence, by means of any promise or threat or otherwise, shall be used to the accused person to induce him to disclose or withhold any matter within his knowledge.

Accused not to be sworn.

345. No oath or affirmation shall be administered to the accused person.

Examination of accused how recorded.

346. Whenever an accused person is examined, the whole of such examination, including every question put to him and every answer given by him, shall be recorded

in full, and shall be shown or read to him, and he shall be at liberty to explain or add to his answers.

When the whole is made conformable to what he declares is the truth, the examination shall be attested by the signature of the Magistrate or Sessions Judge, who shall certify under his own hand that it was *taken in his presence and in his hearing, and contains accurately the whole of the statement made by the accused person.*

In cases in which the examination of the accused person is not recorded by the Magistrate or Sessions Judge himself, he shall be bound, as the examination proceeds, to make a memorandum thereof in the vernacular of the district, or in English, if he is sufficiently acquainted with that language; and such memorandum shall be written and signed by the Magistrate or Sessions Judge with his own hand, and shall be annexed to the record. If the Magistrate or Sessions Judge is precluded from making a memorandum as above required, he shall record the reason of his inability to do so.

The accused person shall *sign* or attest by his mark such record.

If the examination be taken in the course of a preliminary inquiry, and the Court of Session find that the provisions of this section have not been fully complied with, it shall take evidence that the prisoner duly made the statement recorded: Provided that if the error does not prejudice the prisoner, it shall not be deemed to affect the admissibility of the statement so recorded.

["*Shall take evidence, &c.*" This will obviate any risk of a failure of justice, such as was instanced by the case of *The Queen* v. *Radhu Jana and others*, III B. L. Rep. Crim. Rul. 59.]

Magistrate may tender pardon to accomplice.

347. The Magistrate of the district, any Magistrate of the 1st class inquiring into the case, or with the sanction of the Magistrate of the district, any Magistrate duly

empowered to commit to the Court of Session, may, *after recording his reason for so doing*, tender a pardon to any one or more of the persons supposed to have been directly or indirectly concerned in or privy to any offence specified in column seven of the fourth schedule hereto annexed as triable exclusively by the Court of Session, on condition of his or their making a full, true and fair disclosure of the whole of the circumstances, within his or their knowledge, relative to the crime committed, and every other person concerned in the perpetration thereof.

Any person accepting a tender of pardon under this section shall be examined as a witness in the case under the rules applicable to the examination of witnesses.

Such person, if not on bail, shall be detained in custody pending the termination of the trial.

A Magistrate, having tendered a pardon under this section and examined the accused person, is *precluded from trying the case himself.*

High Court or Court of Session may direct tender of pardon.

348. The High Court as a Court of revision, and the Court of Session after committal but before the commencement of a trial, may, with the view of obtaining on the trial the evidence of any person or persons supposed to have been directly or indirectly concerned in or privy to any such offence, instruct the committing Magistrate to tender a pardon on the same condition to such person or persons.

The Court of Session, in like manner and on the same condition, may, at any time before judgment is passed, with the view of obtaining on the trial the evidence of any person or person supposed to have been directly or indirectly concerned in or privy to any such offence, tender a pardon to such person or persons.

When Magistrate, Court of Session or High Court may direct commitment of persons to whom pardon has been tendered.

349. When a pardon has been tendered under section three hundred and forty-seven or section three hundred and forty-eight, if it appears to the Magistrate before the trial, or to the Court of Session before judgment has been passed, or to the High Court as a Court of reference or revision, that any person who has accepted such offer of pardon, has not conformed to the conditions under which the pardon was tendered, either by wilfully concealing anything essential, or by giving false evidence, such Magistrate or Court may commit or direct the commitment of such person for trial for the offence in respect of which the pardon was so tendered.

The statement made by a person under pardon, which pardon has been withdrawn under this section, may be put in evidence against him.

[These Sections of the Court of Criminal Procedure, together with Sections 24—30 of the Indian Evidence Act, contain the Indian Law of Evidence applicable to confessions, which differs in some important particulars from the English law on the same subject. I shall first give an outline of the practice in England, from which the points of difference will be more readily perceived and understood when I come to explain the reasons for the changes which it has been necessary to introduce in India.

Two kinds of confessions—extra-judicial and judicial.

Confessions are divided by English text-writers into *extra-judicial* or those made elsewhere than before a Magistrate or in Court: and *judicial* or those made to a Magistrate or in Court in the due course of legal proceedings—and of these in order. *Extra-judicial confessions* embrace those made as well to private individuals as to the officers of justice, such as constables, Police officers, &c. If *voluntarily* made, they are receivable in evidence after being proved like other facts. With respect to the confession being voluntary, Chief Baron Eyre said—"A confession forced from the mind by the flattery of hope or by the torture of fear, comes in so questionable a shape, when it is to be considered as the evidence of guilt, that no credit ought to be given to it." Where any *inducement* to confess has been held out to the prisoner by one *having authority over him* in connection with the

prosecution,[1] the confession will therefore be rejected. The following have been held to be *persons in authority* within the meaning of the rule—the prosecutor: the master or mistress of the prisoner, where the offence concerns such master or mistress: the officer having the prisoner in charge: the owner of a horse that was stolen: the relations and neighbours of the prosecutor and of the master of the prisoner. The rule holds good if the inducement, though not actually offered by the person in authority, be held out by any one in his presence, and if he by his silence seem to sanction its being made. Where the confession was made on an inducement held out by a person having *no authority*, it was held admissible. The confession is also admissible though inducement have been offered, if from the lapse of time or other cause it be clear that the improper influence was wholly done away with, and that the confession was in nowise owing thereto.[2]

Nature of Inducement.

With respect to the *nature of the inducement*, it must have reference to the prisoner's escape from the criminal charge against him.[3] A confession made under the influence of spiritual exhortations, even though made to a minister of religion, will be admissible. A promise of some *collateral boon or benefit*, as to give the prisoner some spirits, to take off his handcuffs, to let him see his wife, will be no bar to its admissibility.[3] Mr. Taylor (§ 803) is clearly of opinion that the inducement, whether it assume the shape of a promise, a threat, or mere advice, must have reference to the prisoner's escape from the criminal charge then pending against him.[3] Mr. Roscoe (p. 42) does not go so far, but lays it down that the inducement must be at least of a temporal nature. He also lays it down as clear law that an inducement held out with reference to one charge will not affect a confession as to a different charge. A confession made without inducement under a solemn promise or oath of *secrecy* will be admissible.[4] So will a statement made by the prisoner when *drunk*.[4] What the accused was overheard muttering to himself or saying to his wife was admitted against him (see *The Queen* v. *Sagina and another*, VII W. R. Crim. Rul. 38). A confession elicited by *questioning*[4] is admissible; and so also is one obtained by artifice or *deception*,[4] as where the prisoner asked the turnkey to post a letter, and the letter being opened was found to contain matter amounting to a confession: also where the prisoner confessed under the erroneous idea that his accomplices were in custody.

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[1] See Section 24 of the Indian Evidence Act, *ante*, page 101.

[2] See Section 28 of the Indian Evidence Act, *ante*, page 102.

[3] Section 24 of the Indian Evidence Act says, "*gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him.*" *Ante*, page 101.

[4] See Section 29 of the Indian Evidence Act, *ante*, page 103.

In the following cases the confession was held to be inadmissible:—when the defendant was told it would be worse for him if he did not confess; where a threat was made to take him before a Magistrate if he did not give a more satisfactory account; where the following language was used,—"Tell me where the things are and I will be favorable to you"—"You had better tell all you know"—"You had better tell where you got the property"—"You had better split and not suffer for all of them"—"I would be obliged to you, if you would tell us what you know about it; if you will not, of course we can do nothing"—"It will be better for you to speak the truth"—"It is of no use for you to deny it, for there are the man and boy, who will swear they saw you do it." Where a constable told the prisoner the nature of the charge against him, and that he need not say anything to criminate himself, but that what he did say would be taken down and used as evidence against him, and after this the prisoner confessed, the confession was held admissible. Whether any caution should under English law be addressed to the prisoner is a question about which some doubt prevails. "In most cases," says Mr. Taylor, "it may be advisable and proper to caution the prisoner in general terms, that any confession he makes will be admissible against him at the trial and can do him no service; because, if it should turn out that any threat or inducement has been previously held out by some person in authority, the confession which is unaccompanied by such caution will, as before stated, be inadmissible." Mr. Roscoe, on the other hand, says—"The wisest course for policemen and others to adopt is to say nothing to the prisoner, either by way of advice, caution, or interrogation"[1] (see the case of *Nobodip Chundra Goswami*, I B. L. Rep. O. S. Crim. Rul. 15). It may be remarked here that a confession is presumed voluntary until the contrary is shown. Where a free pardon was offered by the Crown to any accomplice who had not struck the blow, and it appeared that the prisoner was influenced by this promise of pardon, his confession was rejected (and see *The Queen* v. *Radanath Dosadh*, VIII W. R. Crim. Rul. 53).[2] Where the confession was made in the course of an examination on oath in other legal proceedings, as during a bankrupt's examination, the Court of Criminal Appeal held it to be admissible. This, however, properly falls under the head of *judicial confessions*, and will be treated of more at length below. A confession may sometimes be inferred from silence or from demeanour, as when the prisoner returns no answer, or an evasive answer,

Confessions held inadmissible.

[1] See Sections 120 and 184 of the Code of Criminal Procedure, Act X of 1872, *ante*, pages 532, 533.

[2] But see now the last para. of Section 349 of the Code of Criminal Procedure, Act X of 1872, *ante*, page 537.

or silently acquiesces in the statements of others made in his presence respecting himself.[1]

Fact discovered in consequence of confession.

Although a confession may be inadmissible in consequence of an inducement having been offered, yet *any discovery that takes place in consequence af such confession or any act done by the defendant, if it be confirmed by the finding of the property*, will be admitted. "Where," says Mr. Taylor, "in consequence of information *unduly obtained* from the prisoner, the property stolen, or the instrument of the crime, or the body of the person murdered, or any other material fact has been discovered, proof is admissible that such discovery was made conformably with the information so obtained. The prisoner's statement as to his knowledge of the place where the property or other article was to be found, being thus confirmed by the fact, is shown to be true, and not to have been fabricated in consequence of any inducement. It is, therefore, competent to prove that the prisoner stated that the thing would be found by searching a particular place, and that it was accordingly so found: but it would not be competent to enquire whether he confessed that he had concealed it there. Lord Eldon has laid down the rule somewhat more strictly, saying, in *Harvey's case*, that where the knowledge of any fact was obtained from a prisoner, under such a promise as excluded the confession from being given in evidence, he should direct an acquittal, unless the fact proved would itself have been sufficient to warrant a conviction, without any confession leading to it. But the sounder doctrine seems to be, that *so much of the confession as relates distinctly to the fact discovered by it may be given in evidence*,[2] as this part at least of the statement cannot have been false." (§ 824.) Where the prisoner himself delivers up the property, contemporaneous declarations explanatory of the act are clearly admissible as part of the *res gestæ* (See Explanation 1, Section 8, of the Indian Evidence Act). If the search for the property be ineffectual, no part of the confession can be received, where it would not be admissible on general principles.

Effect of extra-judicial confessions.

As to the *effect* of *extra-judicial confessions*—are they, if uncorroborated, sufficient for conviction? The subject has been much discussed. Mr. Greaves in a note to *Russell on Crimes* is of opinion that it

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[1] See Section 8 of the Indian Evidence Act, *ante*, page 80.

[2] This is as nearly as may be the language of Section 27 of the Indian Evidence Act. See the case of *R.* v. *Butcher* 1 Lea. 265. *N. Query*—Under Indian Law could this portion of the confession be received if the Police officer, in violation of Section 120 or Section 184 of the Code of Criminal Procedure, Act X of 1872, had offered an inducement by threat or promise? See *The Queen* v. *Bishú Manji*, IX W. R. Crim. Rul. 17, decided under the old Code.

never has been expressly decided that the mere confession of a prisoner alone without other evidence is sufficient to warrant a conviction. In all the English reported cases some corroborating circumstance is to be found. "In the United States," says Mr. Taylor, "the prisoner's confession, when the *corpus delicti* is not otherwise proved, has been held insufficient to warrant his conviction; and this opinion certainly best accords with the humanity of the criminal law, and with the great degree of caution applied in receiving and weighing the evidence of confessions in other cases. Moreover, it seems countenanced by approved writers on this branch of the law." On this point as on others concerning the *weight* to be assigned to evidence, the new Act leaves the discretion of the Courts unfettered. In a case decided before the new Act came into operation, the Calcutta High Court made the following observations.—"The confession of Bechú is conclusive evidence against him, if it be believed. . . . . I do not quite understand why the Sessions Judge told the jury that the confession was evidence, but was not absolutely conclusive. The question for consideration was, whether the confession was voluntary and genuine; and, if no reasonable doubt arose on these points, the confession was legal and sufficient proof of guilt." (*The Queen* v. *Jhari and another*, VII W. R. Crim. Rul. 41. See, however Section 114 of the Evidence Act and the *Illustrations* thereto, *ante*, pages 386—388.)

Distinctive features of Indian Law.

I now proceed to notice certain points of distinction in Indian law. *A confession made to a Police officer* (Section 25, Evidence *Act*), *or to any other person by a prisoner in the custody of the Police* (Section 26, Evidence Act) *is inadmissible in evidence*. The only exception is, that, when any fact is discovered in consequence of *information received from a person accused of any offence, in the custody of a Police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered may be proved* (Section 27, Evidence Act); and the reasons for this exception are those given above. The provisions of the Code of Criminal Procedure thus render inadmissible a large proportion of *extra-judicial confessions*, but the law does not touch confessions made to private individuals, *before the Police have arrested the culprit*. As these have been always admissible under Indian Procedure, they are now also admissible, and will be governed by the several rules contained in the Evidence Act.

Section 184 has reference to a prisoner arrested *on a Magistrate's warrant*. Section 120 refers to persons arrested by the Police in those cases in which the Police have the power of investigation under Chapter X of the Code.[1] The distinction between Sections 25 and 26 of the Evidence Act will be observed. A confession made to a Police

officer is absolutely inadmissible under Section 25, but a confession made by a prisoner in the custody of the Police to a *private person* might seem to be admissible, if made in the presence of a Magistrate. A confession made to the Police would not be admissible merely because of the presence of a Magistrate, while it was being made (*The Queen* v. *Dohum Kahar and others*, XI W. R. Crim. Rul. 82).

The reasons for the above provisions of the Indian Criminal Procedure Code, which exclude confessions made to the Police or while in their custody, will appear from the following extract from the *First Report of the Indian Law Commissioners*:—"The Police in the provinces of Bengal are armed with very extensive powers. They are prohibited from inquiring into cases of a petty nature, but complaints in cases of the more serious offences are usually laid before the Police darogah, who is authorized to examine the complainant, to issue process of arrest, to summon witnesses, to examine the accused, and to forward the case to the Magistrate, or submit a report of his proceedings, according as the evidence may, in his judgment, warrant the one or the other course. The evidence taken by the Parliamentary Committees on Indian Affairs during the sessions of 1852 and 1853, and other papers, which have been brought to our notice, abundantly show that the powers of the Police are often abused for purposes of extortion and oppression; and we have considered whether the powers now exercised by the Police might not be greatly abridged. We have arrived at the conclusion, that considering the extensive jurisdiction of the magistrates, the facilities which exist for the escape of parties concerned in serious crimes, and the necessity for the immediate adoption, in many cases, of the most prompt and energetic measures, it is requisite to arm the Police with some such powers as they now possess; and we have accordingly adopted many of the provisions of the Bengal Code on this head. *In one material point we propose a change in the duties of the Police.* By the existing law, the darogah or other Police officer presiding at an inquiry into a crime committed within his division is required, upon the apprehension of the accused, to 'question him fully regarding the whole of the circumstances of the 'case, and the persons concerned in the commission of the crime, and, 'if any property may have been stolen or plundered, the person in 'possession of such property, or the place where it has been deposited. 'In the event of the accused making free and voluntary confession, 'it is to be immediately written down.' Then follow other provisions

[1] It may be here observed that Chapter IX contains no similar provision respecting persons arrested by the Police, where they have the power of *arrest* but not the power of *investigation*, and where no Magistrate's warrant has been issued.

for preventing any species of compulsion or maltreatment with a view to extort a confession or procure information. But we are informed, and this information is corroborated by the evidence we have examined, that, in spite of this qualification as to the character of the confession, *confessions are frequently extorted or fabricated.* A Police officer, on receiving intimation of the occurrence of a dacoity or other offence of a serious character, failing to discover the perpetrators of the offence, often endeavours to secure himself against any charge of supineness or neglect, by getting up a case against parties whose circumstances or characters are such as are likely to obtain credit for an accusation of the kind against them. This is not unfrequently done by extorting or fabricating false confessions; and, when this step is once taken, there is of course impunity for the real offenders, and a great encouragement to crime. The darogah is henceforth committed to the direction he has given to the case; and it is his object to prevent a discovery of the truth, and the apprehension of the guilty parties, who, as far as the Police are concerned, are now perfectly safe. We are persuaded that any provisions to correct the exercise of this power by the Police will be futile; and we accordingly propose to remedy the evil, as far as possible, by the adoption of a rule *prohibiting any examination whatever of an accused party by the Police, the result of which is to constitute a written document.* This, of course, will not prevent a Police officer from receiving any information which any one may voluntarily offer to him; but the Police will not be permitted to put upon record any statement made by a party accused of an offence."

Sections 330 and 331 of the Indian Penal Code (Act XLV of 1860) provide for the punishment of persons causing hurt in order to obtain confessions. The need for these provisions was clearly established by the proceedings of the Madras Torture Commission.

Judicial Confessions.

Judicial confessions in order to be admissible must be voluntary. They may be made either before the tribunal which has jurisdiction to deal with the offence charged, or before those authorities which have power to commit the accused for trial by such a tribunal. I shall first speak of confessions made before committing Magistrates. The English Law on the subject is contained in the 11 and 12 Vict., Cap. 42, Sec. 18, which enacts that "*after the examinations of all the witnesses* on the part of the prosecution, as aforesaid, shall have been completed, the Justice of the Peace or one of the Justices, by or before whom such examination shall have been so completed as aforesaid, shall, without requiring the attendance of the witnesses, *read or cause to be read to the accused the depositions* taken against him, and shall say to him these words, or words to the like effect:—"Having heard the evidence, do you wish to say anything in answer to the charge? You are not obliged to say anything, unless you

desire to do so, but whatever you may say will be taken down in writing, and may be given in evidence against you upon your trial:"—and whatever the prisoner shall then say in answer thereto, shall be *taken down in writing* and *read* over to him, and shall be *signed* by the said Justice or Justices, and be kept with the depositions of the witnesses, and shall be transmitted with them, as hereinafter mentioned; and afterwards upon the trial of the said accused person, the same may, if necessary, be *given in evidence against him without further proof thereof*, unless it shall be proved that the Justice or Justices purporting to sign the same did not in fact sign the same. *Provided* always that the said Justice or Justices, before such accused person shall make any statement, shall state to him and give him clearly to understand, that he has nothing to hope from any promise of favor, and nothing to fear from any threat, which may have been holden out to him to induce him to make any admission or confession of his guilt, but that whatever he shall then say may be given in evidence against him on his trial, notwithstanding such promise or threat: *Provided*, nevertheless, that nothing herein enacted or contained shall prevent the prosecutor in any case from giving in evidence any admission or confession or other statement of the person accused or charged, *made at any time*, which by law would be admissible as evidence against such person."[1]

Requirements of English compared with those of Indian Law.

Mr. Taylor sums up the requisites of this Statute as follows:—I.—The charge must have been first read to the accused.[2] II.—All the witnesses must have been examined in his presence.[3] III.—The depositions must have been read to him *after* the examinations were completed.[4] IV.—He must then and not till then be twice cautioned by the Justice—*first* generally: and, *secondly*, as to the inefficacy of any promises or threats which may have been formerly held out to him.[4] V.—His whole statement must be taken

[1] The provisions of the English Statute are given merely for the purpose of illustration and explanation. Section 87 of the Code of Criminal Procedure, Act X of 1872, enacts, that "all Magistrates and Courts of Session proceeding against British subjects under this Chapter" (VII) "shall proceed under the provisions of this Act and not according to the law of England relating to Justices of the Peace." See also Section 11. This does not affect proceedings before Police Magistrates of the Presidency towns. See Sections 1 and 540.

[2] Under Indian Procedure, the charge is read *after* the prisoner's examination (Section 199, Code of Criminal Procedure, Act X of 1872).

[3] Necessary in India; but, with the Magistrate's permission, the accused may appear by *agent* (Section 191, *idem*).

Unnecessary in India.

down in his own words.[1] VI.—It must be read to him.[2] VII.—He must be pressed for his signature.[3] VIII.—The Justice must also sign the statement.[4] If these requisites be observed, the statutory confession will be admissible without proof.[5] Mr. Taylor, however, expresses an opinion that in serious cases it would be well to call the Justice or his clerk to prove that the proceedings have been conducted in a proper manner. A witness should also, he thinks, be called, when the prisoner has not signed the statement, to prove its identity, and that the accused assented to it. The Magistrate's certificate supplies this proof in India; but if the statement of the accused person have not been recorded as the law requires, evidence must be taken that the prisoner duly made such statement. He further thinks that it should appear on the face of the document, that it was taken while the prisoner was under examination on a charge of felony or misdemeanour. The examination is evidence on its mere production, unless it can be shown that the signature of the Justice is a forgery. No evidence would be admissible to *vary* or *contradict* the statements contained in the document Parol evidence, however, might be admissible of anything said by the accused *before* the time of his examination. Mr. Taylor expresses a strong opinion that though the principle, that a writing cannot be varied or contradicted by parol testimony, may apply to the body of the examination, it should not extend to the *mere formal heading or conclusion* of the examination, that the presumption, *omnia rité esse acta*, cannot in this more than in any other case be conclusive, and that parol evidence might, therefore, be admitted to show that the requisitions of the statute were not attended to.[6] Where from any cause the statutory examination of the prisoner is rejected for informality, it may yet be used to *refresh* the memory of a witness, and what the prisoner said may be proved in the usual way.

Mr. Roscoe thus sums up the authorities under English Law: "Upon the whole it seems perfectly clear that what is said by a prisoner at any

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[1] In India it must be *conformable to what he declares to be the truth* (Section 346, Code of Criminal Procedure, Act X of 1872, *ante*, p. 535).

[2] *Shown or read to him* in India (*idem*).

[3] In India, the accused person shall sign or attest by his mark such record (*idem*).

[4] So also in India, and the Magistrate must, moreover, certify that it was *taken in his presence and in his hearing, and contains accurately the whole of the statement made by the accused person.*

[5] So also in India, but if the provisions of the law have not been fully complied with, evidence *must* be taken that the prisoner duly made the statement recorded (Section 346, *ante*, p. 535).

[6] See Illustration (*a*) Section 121, *ante*, page 428. See also *ante*, page 301.

time during the preliminary inquiry before a Magistrate *previous to the final examination*, is evidence, which must be proved in the usual way by a person who heard it or by a memorandum acknowledged by the prisoner. As to the statement *made at the final examination*, when the prisoner is called upon, if it is returned in a form, which is available under the Statute, that return is the only evidence of it, exclusive of all parol testimony. If, from some defect or informality, this return is not available, then what is said by the prisoner on this occasion may be proved in the usual way."[1]

Confession made on oath.

Where the examination purports to have been taken *on oath* it will be *inadmissible*. A statement made on oath, it is contended, is not voluntary. "The rule excluding sworn confessions seems strictly confined at Common Law," says Mr. Taylor, "to the case of a statement made by the party upon oath, while a prisoner *under examination respecting the criminal charge*.[2] It is true that one or two decisions by Mr. Baron Gurney might be cited, which seem to extend the rule somewhat further, and to render inadmissible confessions made on oath to Magistrates or Coroners by parties who, after being examined as witnesses, have themselves been committed for trial; but the authority of these decisions has been much shaken by subsequent cases, and they cannot now be safely relied upon as law." (§ 820.) The confession of a prisoner made on oath *in another enquiry* is, however, clearly admissible in evidence under English Law. The distinction between English and Indian law as to answering criminating questions must, however, be borne in mind in applying this doctrine to India. Where the witness was *compelled* to answer, the confession would be clearly inadmissible under Section 132 of the Evidence Act, except on a prosecution for giving false evidences by such answer (see pages 445, 484 *ante*). Where the statement was made without any objection, it might, perhaps, be admissible. If a confessing prisoner were by mistake examined as a witness, English Law would reject the confession. No caution being required by Indian Law, the absence of a caution could not render it inadmissible; but, as Section 345 distinctly forbids the administering of an oath or affirmation, the confession would doubtless be for this reason inadmissible, where an oath or affirmation had been administered. Where a pardon tendered to a prisoner under the provisions of Sections 347 and 348 of the Code of Criminal Procedure, Act X of 1862, has been withdrawn on the ground that the

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[1] *Criminal evidence*, page 58.

[2] In India no oath or affirmation is to be administered to the accused person (Section 345 of the Code of Criminal Procedure, Act X of 1872).

person, who accepted such offer has not conformed to the conditions on which it was tendered, a statement made by such person, while under promise of pardon, may be put in evidence against him. (See Section 349 of the Code of Criminal Procedure).

Effect of judicial confession.

With respect to the *effect of a judicial confession*, if made in the preliminary examinations taken in writing by the Magistrate pursuant to the law, or if made in open Court in the form of a plea of guilty to an indictment, being made under the protecting caution and supervision of the Judge, it is sufficient by itself to support a conviction, though followed by a sentence of death. (Taylor, § 792; Archbold, page 206.) Under the New York Criminal Code, corroboration is required. Section 237 of the Code of Criminal Procedure clearly enacts that at a trial before the Court of Session, a prisoner may be convicted on a plea of guilty. There is no similar provision applicable to *trials of warrant cases*[1] by Magistrates; nor does the law expressly lay down that a conviction at the Sessions on a confession made before, and duly recorded by, a committing Magistrate shall be valid. In the case of *The Queen* v. *Petta Ghazi, Ali Hossein and Wazudin* (IV W. R. Crim. Rul. 19), "the only *direct* evidence against the prisoners was their confession to the Deputy Magistrate," and the conviction was upheld by the Calcutta High Court, although the body of the murdered man was not found. The published report does not show if there was any *indirect* evidence of a *corroborative* nature. In the case of *The Queen* v. *Peter Ram Thappa* (III W. R. Crim. Rul. 11), there *was corroborative* evidence in addition to the confession made before the committing Magistrate. In the case of *The Queen* v. *Runjit Sontal* (VI W. R. Crim. Rul. 73), it was, however, clearly laid down by the Calcutta High Court that "if there are no grounds for questioning the statement made before the committing Magistrate, either as regards the manner of recording it or as to the facts stated in it, *the prisoner can be convicted on that statement, without other corroborative evidence.*" See also *The Queen* v. *Bhattan Bhajwan*, XII W. R. Crim. Rul. 49, where the prisoner denied the confession before the Court of Session.

In the case of *The Queen* v. *Kodai Kahar and others* (V W. R. Crim. Rul. 6), the following remarks were made by the Calcutta High Court:—"The confessions before the Magistrate cannot be said to have been made in answer to any specific charge; they seem to have been taken weeks before any formal charge was regularly preferred before the Magistrate, and before the witnesses were sent in, and can at best only be considered admissions made in the presence of a

[1] As to *Summons cases*, see Section 206 of the Code of Criminal Procedure, Act X of 1872.

Magistrate, and admissible in evidence under Section 149[1] of the Criminal Procedure Code. Confessions are so often in this country obtained by undue influence that, in order to give weight to those recorded under Section 149,[1] we think that there should always be made *a judicial record of the special circumstances under which such confessions were received by the Magistrate*, showing in whose custody the prisoners were, and how far they were free agents." See now Section 122 of the Code of Criminal Procedure. An admission of guilt, fairly made after due warning, is not, however, *inadmissible*, simply because, at the time it was made, no formal accusation had been made against the party making it. (*The Queen* v. *Ram Charan Chamar and others*, IV W. R. Crim. Rul. 10.)

Must European British-born subjects be warned?

The Calcutta High Court on its Original Side (Phear, J.) at the April Sessions of 1865, refused to admit as evidence, on the trial of a *European British-born subject*, the answers given to the interrogations put to him by a Magistrate and Justice of the Peace in the Mofussil during the preliminary inquiry before commitment, on the ground that it did not appear that he had been *duly warned*. This decision was, however, overruled in the case of *The Queen* v. *Nabadwip Chandra Goswamí and another* (¶ B. L. Rep. Orig. Crim. 15), where the law relating to confessions was carefully argued and considered. Section 87 of the Code of Criminal Procedure, Act X of 1872, has now removed all doubt on the subject. See *ante*, Note (1) to page 544, and Section 193 of the Code of Criminal Procedure, *ante* page 533.

Remarks applicable to confessions generally.

It remains to make a few remarks applicable to confessions generally. And first, a confession is evidence *only against the person making* it, and cannot be used against his accomplices. A confession of the theft by a person charged with stealing certain goods, was held no evidence of this fact against another person charged with *receiving* them. (See Roscoe, page 49: Archbold, page 207: Taylor, §§ 795, 804: and *The Queen* v. *Kalíchurn Lohár and others*, VI W. R. Crim. Rul. 84.) Section 30 of the Evidence Act (*ante*, page 103) constitutes an important exception to the rule, when more person than one are being tried *jointly for the same offence*.[2] The admission of an *agent* is no evidence

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[1] Section 149 of the old Code of Criminal Procedure correspond with Section 26 of the new Evidence Act.

[2] A's confession is evidence against B, if A and B are tried jointly; but not if A and B are tried separately. In the latter case they could not confront each other, nor could B have an opportunity of making in A's presence any statement which might go far to neutralize the effect of A's confession. See the effect of this section discussed in the case of the *Queen* v. *Mohesh Biswass and others*, XIX W. R., Crim. Rul., 23.

against his principal, as it sometimes is in civil cases. No person is criminally responsible for the acts of his servants or agents, unless a criminal design be brought home to him. "The rule thus generally laid down is open to an apparent exception," says Mr. Taylor, "in the case of the proprietor of a newspaper, who is, *primâ facie*, criminally responsible for any libel it contains, though inserted by his agent or servant without his knowledge." But Lord Tenterden considered this case as falling strictly within the principle of the rule: for "surely," said he, "a person who derives profit from and furnishes means for carrying on the concern, and entrusts the conduct of the publication to one whom he selects and in whom he confides, may be said to cause to be published what actually appears, and ought to be answerable, though you cannot show that he was individually concerned in the particular publication." Yet even here the defendant may prove, if he can, that the publication was made by his servant without his authority, consent, or knowledge, and that it did not arise from want of due care or caution on his part. (Taylor, § 827.)

The whole of a confession must be taken together. "The whole of what the prisoner said on the subject," says Mr. Taylor, "at the time of making the confession, should be taken together. This rule is the dictate of reason as well of humanity. . . . . But if, after the entire statement of the prisoner has been given in evidence, the prosecutor can contradict any part of it, he is at liberty to do so; and then the whole testimony is left to the jury for their consideration, precisely as in other cases where one part of the evidence is contradictory to another. Even without such contradiction it is not to be supposed that all the parts of a confession are entitled to equal credit. The jury may believe that part which charges the prisoner and reject that which is in his favour, if they see sufficient grounds for so doing. (Taylor, § 795. See also Roscoe, page 51, and Archbold, page 207.) The general rule, that the whole of a confession must be taken together, has been followed by the Calcutta High Court in the case of the *Queen* v. *Chokú Khan and other*, V. W. R. Crim. Rul. 70: *the Queen* v. *Bishú Manji* IX W. R. Crim. Rul. 16: *the Queen* v. *Sheikh Búdhú*, VIII W. R. Crim. Rul. 38, and in other cases. If a *jury* may believe one part of a confession and disbelieve another part, there is no good reason why a judicial functionary, who discharges the duties of both Judge and jury, should not do so likewise. It may be remarked that in the case of a Judge sitting with a jury, though the *effect* of the confession once admitted is a question solely for the jury, the Judge must first decide as to its *admissibility* (see Section 256 of the Code of Criminal Procedure, Act X of 1872).

APPENDIX I.

ZEMINDÂRÍ ACCOUNTS.

Jamá-Wasil-Bakí papers form but a portion of a regular system of *zemindárí* accounts in use in Bengal, where, wrote Warren Hastings, "the accounts of revenue are kept with a regularity and precision unknown in Europe." In order to estimate the real value of these papers in evidence, it is absolutely necessary to have some idea of the system to which they belong. The following sketch of this system taken in part from a book* published many years ago and now out of print, may be useful in giving a general idea of it, though it cannot be thoroughly understood without specimens of the accounts themselves, which it would take up too much space to insert in this place.

* *Zumeendaree Accounts* by D. Carmichael-Smith, Esq., of the Bengal Civil Service. Thacker & Co., 1839.

The *chitthá* or *chitá*, commonly written *chittah*, is an account of all the lands in a village divided into *dags* or parcels which are numbered in a regular series. It contains the quantity of land in each *dag* or parcel, the length and breadth of the parcel, its boundaries, the species of cultivation, and the name of the ryot to whom it belongs. The *chitá* is compiled from actual measurement. Measurements were formerly made every ten or twenty years and are now regulated by express provisions contained in the Rent Laws. The measurement is made in the presence of all the ryots or cultivators, and what is entered in the *chitá* is generally what those interested admit at the time to be correct. It may be otherwise when the relations between *zemindar* and *ryots* are not amicable, but a *chitá* made when there is no dispute going on is valuable as an admission by the parties concerned of the state of things at a time when there was no controversy; and, in the case of subsequent disputes amongst the *ryots* or between neighbouring landholders, the *chitás* are invariably appealed to. The measurement is usually commenced at some well-known place in the village, such as a tank, an old pípul tree, &c., and the first *dag* is said to be north, south, east, or west of this, the three other boundaries being also given. The second *dag* is contiguous to and north, south, east, or west, or a little to the north, south, east, or west of the first—and the rest follow in order.

Chitá.

The *chitás* of the detailed *(khasrah)* measurement made by Government[1] are directed to show: 1,—The number of the plot or parcel. 2,—The number of the estate on the Government *taujíh* or rent-roll. 3,—The name of the estate. 4,—The name of the owner of the estate. 5,—The name of the occupant ryot. 6,—Position of each plot with relation to the preceding plot. 7,—Measure of each length taken. 8,—Mean length and direction. 9,—Length of each breadth taken. 10,—Mean breadth and direction. 11,—Area of land. 12,—Description of land. 13,—Sort of produce. 14,—Remarks. (See *Rules for the Guidance of Officers engaged in the administration of the Revenue Department in the Lower Provinces of Bengal*, 1866, Chap. XXIII s. iii. para. 8).

Goshwára.

The *Goshwára* is an abstract of the *chitás*, showing the total quantity of land and its distribution, as waste, cultivated, fallow, grazing-land, road-land, land occupied by houses, by gardens, by tanks, &c. It contains a separate page for *raiyatí* (rent of which is paid in money), *khamár* (rent of which is paid in kind), *khúd-kasht* (held by cultivators residing in the village, generally hereditary cultivators, literally, sowing one's own ground), *paikasht* (held by non-resident cultivators literally sowing land near or adjacent), *thiká* (cultivated by hire or contract), *chakarán* (appropriated to the maintenance of the servants of the village establishment), *deotar* (devatra, rent-free granted for the support of idols or temples), *brahmottara* (land granted to Brahmins), *fakírána* (appropriated to Mahomedan religious mendicants), and other kinds of land. Where there are not more than one *chitá* for a village or where the *chitá* does not contain a large number of *dags*, the *goshwára* is sometimes dispensed with.

Cuttean.

The *Cuttean* (properly *khatáüni*) is a sort of ledger in which is entered the name of each ryot, the quantity of land held by him in each *mehal* (*i. e. khud-kasht*, *paikasht*, *khamár* mehal, &c., as it may be), in what *chitá* contained, the number of the *dâg*, and the species of cultivation. In case of disputes between the cultivators a reference to this account will show exactly how much land ought to be in the possession of each. Rent-free (lakheraj) land is also shown in the *cutteean*.

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[1] At page 639 and following pages of the *Supplement to the Calcutta Gazette of the 4th December*, 1872, will be found a "Memorandum on the Khasrah Survey of Bengal," which shows that even the Government Survey is not always to be depended upon. Occasionally, when the Amíns came to close their *circuits*, they could not find space on the map for all the fields, as the whole of it had already been filled up, and so the excess fields were shown on the margin and outside the map itself! Occasionally, also, the centre space was more than sufficient for all the fields measured, and *the surplus space was filled up with ideal fields*, "*ashmaní dágs*," as they were called! and this was not discovered for many years after.

Ekwal.

The *Ekwal* (thought by Wilson to be a corruption of *akwal*=agreements) shows the entire quantity of the land in each individual cultivator's possession, in each separate mehal with a detail of the cultivation. The *jamabandí* is formed from this and the *cuttean*, the quantity and description of land in each cultivator's possession being ascertained therefrom in order to the settling of the *jamá* or rent. The *ekwal* further serves as a check upon the other portions of the system of accounts, as the general abstracts of this and of the *goshwára* ought to tally precisely.

Cuttean Tírij.

The *Cuttean Tírij* (an abstract account compiled from other details) shows the total gross quantity of land in each cultivator's possession and the details of the cultivation. The difference between this and the *ekwal* is that the *ekwal* shows the whole quantity in each mehal in the page of the account allotted to such mehal, *khud kasht*, *paikasht*, &c., but in the *cuttean tírij* these items are all collected and totalled under the name of the individual ryot. *Lakheraj* land is not included in the *cuttean tírij*.

Jamabandí.

The *Jamabandí* shows the quantity of land held by each cultivator, its different qualities (*i. e.*, whether it grows paddy, mustard, cotton, &c.), the rate of rent for each kind of land, the total rent for all the land of that particular kind in each cultivator's possession, and, lastly, the grand total for all the lands of every kind held by him. The *jamabandí* is valuable for showing the pergunnah or prevailing rate of rent for lands of each of the different kinds.

Taujíh.

The *Taujíh* (vulgarly *Towjee*, "explaining," "calling attention") shows the total rent payable by each cultivator, the number of instalments in which it is payable, and the months in which these instalments are to be paid.

Talab-Baki.

In the *Talab-Báki* (literally demand-balance) are shown on one side of the page the amount of rent due by each cultivator (including the balance (if any) due from former years and the amount payable for the year of account), and on the other side the sums paid during the year with the date of each payment. At the close of the year the balance is struck and carried on to the accounts of the following year. The accuracy of the *talab-báki* may be tested by reference to the *siáh* or day-book. The total balance must also correspond with the total balance of the *jamá-wasíl-báki*.

Kharcha-Hisáb.

The *Kharcha Hisáb* shows on one side of the page a detailed statement of the land as by the *ekwal* and *jamábandí*, together with the total amount of rent payable for each kind of land. If any change in the quantity of land

held by each cultivator have been made since drawing up the talab-bákí, it will here be entered under the head *khárij* (transferred *to* another cultivator) *dakhil* (transferred *from* another cultivator), *kamí* (less) or *beshi* (more). On the other side of the page is entered the total demand of rent, the total sum collected after deducting *batta* (difference of exchange for coins of different currencies), &c., and, the latter being deducted from the former, the balance shows what is still due by each ryot in each mehal.

Jamá-Wasil-Bákí.

The *Jamá-Wasil-Bákí* shows, distributed under each mehal, the total rent demandable from each ryot for the current year, the balance of previous years, the amount collected during the year, and the balance due at the end thereof. Its form differs much in different districts. In some it includes an account of the land as well as of the rent; in others the rent only is given It occasionally contains abstracts showing the number of ryots present, the number absconded, the total quantity of rent collected and in arrear for each *mehal*, account of *batta*, &c. It also shows the account of *abwábs* or cesses: and, these being now prohibited by law, it is not uncommon to have two sets of *jamá-wasil-bákí* accounts, the one set showing the *abwabs* for private use, the other set, in which they are omitted, for purposes of litigation and showing to Government officials. The *jamá-wasil-bákí* is only made out at the end of the year, and the items shown in it are carried from the other accounts, it may be, by a mohurrir or writer who has no personal knowledge of the payments or other facts set forth by such items.

Síáh.

The *Síáh* is the day-book of all the receipts and disbursements connected with the estate. It shows all sums received and disbursed, whether customary or incidental. It commences with the day on which the *Punyá* is performed, and closes with the current year. An original *siáh* has three distinguishing marks at the top of the first page, for, during the *pujah* or religious ceremony, which always precedes the *Punyá*, the officiating Brahmin mixes a small quantity of red ochre (*sindhúr*) with some ghee (clarified butter) and some turmeric (*haldí*) and sandalwood (*chandan*) with water: and a small portion of these three mixtures, each about the size of a rupee, is put upon the first leaf of the *síáh*, the name of some Hindú deity having been previously engrossed. *Punyá*, literally 'pure,' 'holy,' is the holy or auspicious day at the commencement of the year, chosen by the Brahmins for fixing the rent of the coming year and paying the first instalment, the first payment being made by the ryot, whose family for generations has been in the habit of so doing. The correctness of any of the other accounts can be tested by referring to the *síáh*.

The *Tírij-Jamá-Kharch* (literally, "abstract of receipts and disbursements") is an abstract of the *síáh*, and is made therefrom. It shows

concisely the total collections and total disbursements, and is usually submitted by the gomashtah to the zemindar at the close of the year when the accounts are finally passed.

The complete system of accounts above described is not to be found in every *Zemindari Sherishteh*, and in every district. The nearest approach to completeness is to be met with where the estates and the number of ryots are large, all parts of the system being then useful to show distinctly the different details just explained. Where the estates are small and the number of ryots few, there is not the same necessity for separate details. In all districts, however, the *síáh* and *jamá-wasil-báki* or books of account differently named perhaps, though in all essential particulars corresponding thereto, are to be met with. Where the other accounts are not kept, the *jamá-wasil-báki* is written up from the *síáh*. It should always be remembered that the *jamá-wasil-báki* is not the account-book, which contains the *original entry of the transaction*, and that it may or may not be written up by a person who had no personal knowledge thereof. In large estates where the rents are collected at several places, there is generally a head office or *sádr sherishtah* to which the receipts and accounts are forwarded. The *jamá-wasil-báki* prepared from these materials at the head office would, of course, be less reliable than a similar account prepared by the *amlahs*, who had themselves received the rent. Where the zemindar and the *ryots* are on good terms, and there is no contest going on as to measurement of land or enhancement of rent, the *jamá-wasil-báki* may, however, generally be relied upon. Where such is not the case, where there are disputes and consequent litigation, and this account-book is produced on the side of the *zemindar* and by his *amlah* to prove any essential portion of his case, it cannot be too carefully tested and examined, and cannot be received with too great caution. The zemindar may be wholly above a resort to forged documents or false evidence, but he may be indolent or may willingly leave in the hands of his *amlah* what appears to belong to their province; and here the remarks made, *ante*, pages 53 and 64, apply.

Books of account in India are not bound as in England, but consist of long strips of paper secured together by a string. The uniformity of the marks of use throughout the strips makes it almost impossible to insert a new leaf without the insertion being detected; and as the number of leaves in each book is usually entered at the beginning of the particular book or of the series of accounts, the absence of a leaf may easily be discovered.

APPENDIX II.

Cases connected with the record known in the North-Western Provinces as Wajib-úl-arz.

(See Clause 1, Section 9, Regulation VII of 1822.)

In the case of *Chaudhrí Brij Lal* v *Rájá Gúr Sahai and others*, I N.-W.-P. Rep. Full Bench, 128, the following question was submitted to a Full Bench of the High Court:—"Whether compliance with all or any of the conditions prescribed by the Mahomedan law is indispensable to give validity to a claim of pre-emption preferred under the stipulations of the record of rights known as the *wajib-úl-arz*, prepared on the occasion of making or revising a settlement." After a long discussion of the subject, valuable as dealing with the powers and duties of settlement officers, the question was thus answered:—"The *wajib-úl-arz* is to be regarded as a contract, or rather as *an official record of admitted usages or agreements*. In construing it, the Court should apply the same rules which would guide them in the interpretation of any other record, the terms of which may be assumed to have been accepted by the persons who can be proved to have assented to them, or who may derive title from persons who have so assented. If it appear from the terms of the record that the Mahomedan custom was recorded as prevailing, then the precepts of the Mahomedan law, although not expressly mentioned, must be regarded in determining the rights of the parties. If it appear from the terms of the instrument that some particular local custom of pre-emption was recorded as prevailing, then the Courts must determine the rights of parties with reference to the peculiar incidents which may be proved to have formed part of the custom in the particular district at the time the record was made, and which may or may not be identical with the precepts of the Mahomedan law. If, on the other hand, it appears from the terms of the record (and this we believe will be generally the case) that the condition of pre-emption was introduced, not as a recorded custom, but as an agreement either entirely new in its origin, or based upon but superseding a former custom, or prescribing and defining the conditions of the custom, then we hold that it is practically a suppression of the agreement made by the parties to import into it conditions which were not only not contemplated by the parties, but are repugnant to the end they had in view."

The *Wajib-úl-arz* contained the following condition:—"If any shareholder whose name is in the *khewat* wishes to alienate his share, he is competent to do so under this condition: *first*, he shall do so to his own brother; and if *he* does not take, then to the hands of the shareholder of the *patti*; and if *he* refuses to take it, then to any of the shareholders of the village; and if they refuse, then to any one he pleases." *Held*, that the persons to whom the preferential right of purchase was secured were *entitled to an offer of the property*, and that, until they had declined, no alienation could be made to persons not entitled to that preference (*Abdúla Khan* v. *Amirun and others*, I N.-W.-R. Rep. Civ. Ap. 274.) If a person entitled to such preference comes forward without unreasonable delay after hearing of a sale made without any tender to him, his claim should be decreed, even though he may not prove that he has fulfilled all the conditions required in the case of a claim of pre-emption under the Mahomedan custom of shúfa (*Koula Put and others* v. *Maharaj Dúbey*, I N.-W.-P. Rep. Civ. Ap. 278; see also *Parmeshrí Das* v. *Rai Kúndun Singh, &c.* IV N.-W.-P. Rep. Civ. Ap. 3).

The rights of a judgment-debtor were put up to sale in execution and bought in by the decree-holder, who, before the auction-sale was carried into effect, gave up his rights to the judgment-debtor in consideration of Rs. 200: *Held* that there was no sale such as would give the co-sharers the right to claim pre-emption under the *wajib-úl-arz* (*Mahomed Raza Khan* v. *Jawahir Singh, &c.* II N.-W.-P. Rep. 1).

The pre-emptive condition in the *wajib-úl-arz* was, that alienation shall be made *first to brethren of a common ancestor*, and if they refuse, then *to the other sharers of the patti*, and if they do not take, then to any one: *Held* that the brethren in whose favor the first right of pre-emption is provided must be considered to be *brethren* who are *sharers* in the *patti* (*Her Sahai and others* v. *Jawala and others*, II N.-W.-P. Rep. Civ. Ap. 31).

Held that the holder of a resumed *maáfi chuck*, who was no party to the *wajib-úl-arz*, was not a co-sharer so as to acquire or render his property subject to the condition as to pre-emption contained therein (*Sheo Lal Sahú* v. *Shaikh Rámzaní*, II N.-W.-P. Rep. Civ. Ap. 35).

A stipulation in the *wajib-úl-arz*, that alienation shall be made with the consent of all sharers, creates no right of pre-emption (*Ram Persád Sahú, &c.* v. *Sheikh Ramzání*, II N.-W.-P. Rep. Civ. Ap. 37: *Gayadín* v. *Ram Sahai, &c.* III N. W. P. Rep. Civ. Ap. 181).

A lease for twenty years, reserving a rent of Rs. 600, was held not to come within a condition in a *wajib-úl-arz* conferring the right of pre-emption on sharers in cases of *sale* or *mortgage* (*Rai Manick Chand* v. *Rai Biseshír Baksh Singh, &c.* II N.-W.-P. Rep. Civ. Ap. 99). So as to a deed of arrangement, by which the shares in a village were made over to a manager on trust to pay certain debts and hand

over the residue of the profits to the sharers, who agreed not to alienate till the debt was discharged, this deed being held not to operate to divest the property from the sharers and vest it in the manager (*Outar Singh* v. *Mussamat Ablakhí Kúnwar, &c.* III N.-W.-P. Rep. Civ. Ap. 328).

The right of pre-emption in cases of transfer, sale, &c., reserved to co-sharers in the administration paper was held to apply to an usufructuary lease for a term of years of a share in a village, regard being had to the object of inserting such a prohibition against transfer, *viz.* to keep out strangers and to retain the property in the lands of the brotherhood (*Ahmed Alí Khan and others* v. *Ahmed and others*, I N-W-P. Rep. Civ. Ap. 101: *Girdhari Lal and another* v. *Umrai Singh and another*, IV N-W-P. Rep. Civ. Ap. 249. It was here remarked that consent to the *wajib-úl-arz* may be expressed in words or writing or evidenced otherwise.)

A transfer, not to a tenant but to a mortgagee, who, during the currency of the mortgage, was to hold the land in the place of the proprietor, was held to be comprehended under the term "*intiqual*" used in the *wajib-úl-arz* (*Chuttur Mull* v. *Chuttur Kishore Lall, &c.* V N-W-P. Rep. Civ. Ap. 396).

A cultivator, co-sharer, or other person who is no party to, and has not signed the village administration paper, is not affected by its contents (*Hakim Syud Meher Alí* v. *Kunhai and another*, I N-W-P. Rep. Rev. Ap. 13: *Pachúa* v. *Mahomed Tala Asadúla*, II N-W-P. Rep. Civ. Ap. 217: *Dhuní Ram* v. *Múrli Dhur*, III N-W-P. Rep. Civ. Ap. 326: *Mussamat Míran, &c.* v. *Mussamat Najíban*, III N-W-P. Rep. Civ. Ap. 335: *Chondan Singh, &c.* v. *Mussamat Nirto, &c.* IV N-W-P. Rep. Civ. Ap. 11 (44 Ca.)).

But a person who has signed the *wajib-úl-arz* will be bound by it. A *zemindar* having signed a condition agreeing not to enhance a ryot's rent, was held thereby debarred from enhancing. (*Nuttho Ram* v. *Sukh Ram, &c.* IV N-W-P. Rep. Civ. Ap. 90).

Government confiscated a convict's share in a certain village, such share being subject to a condition in the *wajib-úl-arz*, giving a right of pre-emption to co-sharers: *Held* that Government, in acquiring the convict's share, took it in the same state in which he held it before conviction, and therefore subject to the above condition in the *wajib-úl-arz* (*The Collector of Futtehpore* v. *Syud Yad Alí*, I N-W-P. Rep. Civ. Ap. 88).

In the proceedings of a Settlement Officer, dated 16th December, 1861, it was stated to be a reason for enhancing the land revenue that the zemindar derived an income from a cess of 1 *per cent.* levied on the weighing of grain, &c. B presented a petition objecting to this cess. His objection was disallowed by an order dated 16th October, 1862. On

the 10th March, 1865, B brought a suit to set aside this award—*Held* that, with reference to Clause 6, Section 1, Act XIV of 1859, the three years were to be reckoned from the latter date, and that he was within time. The proceeding of the 16th December, 1861, was not a judicial award, which the order of the 16th October, 1862, was. It was also observed that the mention of the cess in the *wajib-úl-arz*, although, on the assumption that the cess is a customary one, it would authorize its collection, is not conclusive proof against persons who were not parties to that record; that the cess had been levied by the zemindars for such a length of time and with such uniformity, that the usage which sanctioned its levy might be held to have acquired the force of law, and to be binding on those who might choose to resist the demand (*Ram Chand* v. *Zohur Alli Khan*, I N-W-P. Rep. 134, 136).

A claim was made for certain *zemindarí* dues said to be payable in respect of the sale of certain garden trees. The settlement papers had been destroyed. The plaintiff had based his claim (properly as the Court remarked) not merely on usage, but also on the administration papers, in which the law requires that such dues be recorded. The decision of the Lower Court proceeded merely on village custom. The case was remanded that secondary evidence might be taken of the contents of the papers destroyed, with a view to determine whether such custom had been recognized and recorded therein (*Paul Rai and others* v. *Ram Hit Panday*, I N-W-P. Rep. Civ. Ap. 139.) As to the zemindar's right to one-fourth of the sale proceeds in cases of involuntary sale, as in execution, see *Bijnath Persaud, &c.* v. *Mahomed Fazl Hossain, &c.* III N-W-P. Rep. Civ. Ap. 204.

"The entry in the *wajib-úl-arz* is only good for what it may be worth as evidence, and has been so regarded by the Court below, and cannot be held to be like a judgment or to require to be set aside by a suit subject to a limitation reckoned from the date of the instrument." (*Bhola Singh* v. *Bulraj Singh*, I N-W-P. Rep. Civ. Ap. 233).

The purchaser of the rights of certain mortgagors, confiscated and sold on account of rebellion, signed, at the time of settlement, a stipulation inserted in the *wajib-úl-arz*, to the effect that the rates paid by the mortgagees in possession should not be enhanced till 1277 *Fas.* The mortgagees, the mortgage lien being discharged, became mere cultivators with rights of occupancy: *Held* that the purchaser on getting possession of the estate could not sue in the Revenue Court to enhance their rent before 1277 *Fás.* without first bringing his suit in the Civil Court to obtain a declaration of his right to enhance, and to have the conditions in the *wajib-úl-arz* set aside (*Khyali Ram and others* v *Mahomed Alí Khan*, I N-W-P. Rep. Rev. Ap. 62).

Two brothers, A and B, made a solemn agreement, restraining B from alienation, except for purposes necessary and *boná fide*. A subsequent

wajib-úl-arz contained the condition that every co-sharer is at liberty to alienate, but must inform his next nearest neighbour, co-sharer, &c. *Held*, that this condition, being for a different purpose, was not opposed to and did not cancel the previous agreement between the brothers. (*Radhai Panday* v. *Munsa Ram and others*, II N-W-P. Rep. Civ. Ap. 85).

The *wajib-úl-arz* contained a stipulation that trees could be planted on the common land by cultivators only with the consent of the proprietors—a condition so general as to amount to law in the North-West Provinces. *Held*, that one co-proprietor could not give permission to plant without the consent, express or implied, of the other co-proprietors (*Ghazi-udin Hyder* v. *Bhulun and another*, III N-W-P. Rep. Civ. Ap. 344).

The mention in a *wajib-úl-arz* of an old mortgage-deed (which had been lost) was held not to give rise to a new security, but to be a mere recital of an existing mortgage, and of the terms of redemption (*Rao Kurun Singh* v. *Mussamat Mehtab Kunwar*, &c. IV N-W-P. Rep. Civ. Ap. 150).

See also as to the *Record of Rights*, "Maine's Village-Communities in the East and West," *pages* 32, 33, and 72; and sections 14, 15, 16, 18, 19, 20, 21, 39 and 40 of "The Panjáb Land-Revenue Act, XXXIII of 1871."

APPENDIX III.

THE INDIAN OATHS ACT, X OF 1873.

(RECEIVED THE ASSENT OF THE GOVERNOR-GENERAL ON THE 8TH DAY OF APRIL, 1873).

An Act to consolidate the law relating to Judicial Oaths, and for other purposes.

Preamble.

WHEREAS it is expedient to consolidate the law relating to judicial oaths, affirmations and declarations, and to repeal the law relating to official oaths, affirmations, and declarations; It is hereby enacted as follows:—

I.—Preliminary.

Short title.

1. This Act may be called "The Indian Oaths Act, 1873."

Local extent.

It extends to the whole of British India, and, so far as regards subjects of Her Majesty, to the territories of Native Princes and States in alliance with Her Majesty;

Commencement.

And it shall come into force on the first day of May 1873.

Repeal of enactments.

2. The enactments specified in the schedule hereto annexed are repealed to the extent mentioned in the third column thereof.

Saving of certain oaths and affirmations.

3. Nothing herein contained applies to proceedings before Courts Martial, or to oaths, affirmations or declarations prescribed by any law which, under the provisions of the Indian Councils' Act, 1861, the Governor General in Council has not power to repeal.

II.—Authority to administer Oaths and Affirmations.

Authority to administer oaths and affirmations.

4. The following Courts and persons are authorized to administer by themselves or by an officer empowered by them in this behalf, oaths and affirmations in discharge of the duties or in exercise of the powers imposed or conferred upon them respectively by law:—

(*a.*) All Courts and persons having by law or consent of parties authority to receive evidence;

(*b.*) The Commanding Officer of any military station, occupied by troops in the service of Her Majesty: provided

(1) that the oath or affirmation be administered within the limits of the station, and

(2) that the oath or affirmation be such as a Justice of the Peace is competent to administer in British India.

III.—Persons by whom Oaths or Affirmations must be made.

Oaths or affirmations to be made by—

5. Oaths or affirmations shall be made by the following persons:

witnesses:

(*a.*) all witnesses, that is to say, all persons who may lawfully be examined, or give, or be required to give, evidence by or before any Court or person having by law or consent of parties authority to examine such persons or to receive evidence:

interpreters:

(*b.*) interpreters of questions put to, and evidence given by, witnesses, and

jurors.

(*c.*) jurors.

Nothing herein contained shall render it lawful to administer in a criminal proceeding an oath or affirmation to the accused person, or necessary to administer to the official interpreter of any Court, after he has entered on the execution of the duties of his office, an oath or affirmation that he will faithfully discharge those duties.

Affirmation by Natives or by persons objecting to oaths.

6. Where the witness, interpreter or juror is a Hindú or Muhammadan,

or has an objection to making an oath,

he shall, instead of making an oath, make an affirmation.

In every other case the witness, interpreter or juror shall make an oath.

IV.—Forms of Oaths and Affirmations.

Forms of oaths and affirmations.

7. All oaths and affirmations made under section five shall be administered according to such forms as the High Court may from time to time prescribe.

And until any such forms are prescribed by the High Court, such oaths and affirmations shall be administered according to the forms now in use.

Explanation.—As regards oaths and affirmations administered in the Court of the Recorder of Rangoon and the Court of Small Causes of Rangoon, the Recorder of Rangoon shall be deemed to be the High Court within the meaning of this section.

Power of Court to tender certain oaths.

8. If any party to, or witness in, any judicial proceeding offers to give evidence on oath or solemn affirmation in any form common amongst, or held binding by, persons of the race or persuasion to which he belongs, and not repugnant to justice or decency, and not purporting to affect any third person, the Court may, if it thinks fit, notwithstanding anything hereinbefore contained, tender such oath or affirmation to him.

Court may ask party or witness whether he will make oath proposed by opposite party.

9. If any party to any judicial proceeding offers to be bound by any such oath or solemn affirmation as is mentioned in section eight, if such oath or affirmation is made by the other party to, or by any witnesses in, such proceeding, the Court may, if it thinks fit, ask such party or witness, or cause him to be asked, whether or not he will make the oath or affirmation:

Provided that no party or witness shall be compelled to attend personally in Court solely for the purpose of answering such question.

Administration of oath if accepted.

10. If such party or witness agrees to make such oath or affirmation, the Court may proceed to administer it, or if it is of such a nature that it may be more conveniently made out of Court, the Court may issue a Commission to any person to administer it, and authorize him to take the evidence of the person to be sworn or affirmed and return it to the Court.

Evidence conclusive as against person offering to be bound.

11. The evidence so given shall, as against the person who offered to be bound as aforesaid, be conclusive proof of the matter stated.

Procedure in case of refusal to make oath.

12. If the party or witness refuses to make the oath or solemn affirmation referred to in section eight, he shall not be compelled to make it, but the Court shall record, as part of the proceedings, the nature of the oath or affirmation proposed, the facts that he was asked whether he would make it, and that he refused it, together with any reason which he may assign for his refusal.

V.—Miscellaneous.

Proceedings and evidence not invalidated by omission of oath or irregularity.

13. No omission to take any oath or make any affirmation, no substitution of any one for any other of them, and no irregularity whatever in the form in which any one of them is administered, shall invalidate any proceeding or render inadmissible any evidence whatever, in or in respect of which such omission, substitution or irregularity took place, or shall affect the obligation of a witness to state the truth.

14. Every person giving evidence on any subject before any Court or person hereby authorised to administer oaths and affirmations shall be bound to state the truth on such subject.

Persons giving evidence bound to state the truth.

15. The Indian Penal Code, sections 178 and 181, shall be construed as if, after the word "oath," the words "or affirmation" were inserted.

Amendment of Penal Code, sections 178 and 181.

16. Subject to the provisions of sections three and five, no person appointed to any office shall, before entering on the execution of the duties of his office, be required to make any oath, or to make or subscribe any affirmation or declaration whatever.

Official oaths abolished.

SCHEDULE.

(*See section* 2).

PART I.—STATUTES.

Year and chapter.	Title.	Extent of repeal.
9 Geo. IV, c. 74.	An Act for improving the Administration of Criminal Justice in the *East Indies*.	Sections thirty-six and thirty-seven.
3 & 4 Wm. IV, c. 49.	An Act to allow Quakers and Moravians to make Affirmation in all cases where an Oath is or shall be required.	The whole Act, so far as it applies to British India.
3 & 4 Wm. IV, c. 82.	An Act to allow the People called Separatists to make a solemn Affirmation and Declaration instead of an Oath.	The whole Act, so far as it applies to British India.
5 & 6 Wm. IV, c. 62.	An Act to repeal an Act of the present Session of Parliament, intituled "An Act for the more effectual Abolition of Oaths and Affirmations taken and made in various Departments of the State, and to substitute Declarations in lieu thereof; and for the more entire Suppression of voluntary and extra-judicial Oaths and Affidavits;" and to make other Provisions for the Abolition of unnecessary Oaths.	The whole Act, so far as it applies to British India.
1 & 2 Vic. c. 77.	An Act for permitting Affirmation to be made instead of an Oath in certain cases.	The whole Act, so far as it applies to British India.

PARTS II.—ACTS.

Number and year.	Title.	Extent of repeal.
IX of 1836...	Commanding Officer's power to administer Oaths.	The whole.
XXI of 1837...	Office Oaths and Declarations ...	So much as has not been repealed.
V of 1840...	An Act concerning the Oaths and Declarations of Hindoos and Mahometans.	So much as has not been repealed.
XV of 1843...	An Act for the more extensive employment of Uncovenanted Agency in the Judicial Department.	Section two.
XV of 1852...	An Act to amend the Law of Evidence.	Section twelve.
XII of 1856 ...	An Act to amend the Law respecting the employment of Ameens by the Civil Courts in the Presidency of Fort William.	Section four.
VII of 1857 ...	An Act for the more extensive employment of Uncovenanted Agency in the Revenue and Judicial Departments in the Presidency of Fort St. George.	Section two.
XII of 1859 ...	An Act to make better provision for the trial of Pilots at the Presidency of Fort William in Bengal for breach of duty.	Sections twelve and fifteen.
XVIII of 1863	An Act to make provision for the speedy and efficient disposal of the business now pending in the Office of the Master of the High Court of Judicature at Fort William in Bengal, and to provide for the abolition of the Oaths now administered to Hindoos and Mahomedans in the said Court, and to amend the Code of Civil Procedure in respect of process issued out of the said Court in the exercise of its Original Civil Jurisdiction.	Section nine.

PART II.—*(Continued.)*

Number and year.	Title.	Extent of repeal.
IV of 1866 ...	An Act to amend the constitution of the Chief Court of Judicature in the Punjab and its Dependencies.	Section five.
II of 1869 ...	An Act for the appointment of Justices of the Peace.	Sections seven and eight.
IV of 1871 ...	An Act to consolidate and amend the Laws relating to Coroners.	Section seven, and, in section thirty-eight, the words "and such deputy shall take and subscribe, before one of the Judges of the High Court, an oath that he will faithfully discharge the duties of his office."
VI of 1871 ...	An Act to consolidate and amend the Law relating to the District and Subordinate Civil Courts in Bengal.	Section thirteen.
VI of 1872 ...	An Act to amend the Law relating to Oaths and Affirmations.	The whole.
XVIII of 1872	An Act to amend the Indian Evidence Act, 1872.	Section twelve.
Bombay Act VI of 1866.	An Act to amend the Law relating to certain Declarations of Office in the Bombay Presidency.	The whole.
Bengal Regulation IV of 1793.	A Regulation for receiving, trying, and deciding Suits or Complaints declared cognizable in the Courts of Dewanny Adawlut established in the several Zillahs, and in the Cities of Patna, Dacca, and Moorshedabad.	So much of section six as has not been repealed.

PART II.—(*Continued.*)

Number and year.	Title.	Extent of repeal.
Bengal Regulation III of 1803.	A Regulation for receiving, trying, and deciding Suits or Complaints, declared cognizable in the Courts of Adawlut established in the several Zillahs in the Provinces ceded by the Nawaub Vizier to the Honorable the English East India Company.	So much of section seven as has not been repealed, and section eight.
Bengal Regulation IX of 1833.	A Regulation to modify certain Portions of Regulation VII of 1822, and Regulation IV of 1828; to provide for the more speedy and satisfactory Decision of Judicial Questions cognizable by Officers of Revenue employed in making Settlements under the above Regulations; for enforcing the Production of the Village Accounts; for the more extensive Employment of Native Agency in the Revenue Department; and to declare the Intent of Section V Regulation VII of 1822, touching Claims to Malikana.	Section nineteen.
Madras Regulation I of 1803.	A Regulation for defining the duties of the Board of Revenue, and for determining the Extent of the Powers vested in the Board of Revenue.	Sections two and three.
Madras Regulation II of 1803.	A Regulation for describing and determining the conduct to be observed by Collectors in certain cases.	Sections three and four.
Madras Regulation XIV of 1816.	A Regulation for amending and modifying the Rules which have been passed regarding the Office of Vakeel or Native Pleader in the Courts of Civil Judicature.	Section five.
Bombay Regulation VI of 1799.*	A Regulation for enacting the existing Rules for the Collection of the Bombay Customs.	Section two, clause two, from and including the words "previous to" down to the end of that clause.

* Printed at p. 246 of Clarke's edition of the Bombay Regulations, London, 1851.

PART II.—*(Continued.)*

Number and year.	Title.	Extent of repeal.
Bombay Regulation II of 1827.	A Regulation for defining the constitution of Courts of Civil Justice, and the powers and duties of the Judges and officers thereof.	Sections four and fifteen. In section eleven, clause one, the words "who previously to entering on the duties of their offices shall take and subscribe in open Court the oath contained in Appendix B." Appendix B.
Bombay Regulation XII of 1827.	A Regulation for the establishment of a system of Police throughout the Zillahs subordinate to Bombay, for providing Rules for its Administration, and for defining the Duties and Powers of all Police Authorities and Servants.	So much of section three, clause five, as has not been repealed.
Bombay Regulation XIII of 1827.	A Regulation for defining the Constitution of Courts of Criminal Justice, and the Functions and Proceedings thereof.	So much of section thirty-six, clause two, as has not been repealed.
Bombay Regulation XVI of 1827.	A Regulation defining the Duties of the Collector, and his Powers in regard to Subordinate Revenue Officers, and providing Rules for the guidance of Land Revenue Officers in general, throughout the Territories subordinate to Bombay.	Section three, and so much of section five as relates to taking oaths.
Bombay Regulation XIX of 1827.	A Regulation for the Presidency, prescribing Rules for the Assessment and Collection of the Land Revenue, and for collecting Taxes on Shops and Stalls, on beating the Battakee or making Proclamation by the Crier, on Country Music, on Wedding Sheds and Places of Public	Section one, clause two; and section six from and including the words "and shall" down to the end.

PART II.—*(Continued.)*

Number and year.	Title.	Extent of repeal.
	Amusement, on Houses, on Carriages, and on Horses; for causing Individuals who may sell or transfer Houses or Tenements subject to quit or ground rents to give Notice of the same to the Collector; and also for levying Fees in the Court of Petty Sessions and Police Offices.	Appendix A.
Bombay Regulation XVIII of 1830.	A Regulation providing for the appointment of a Joint Judge within the Zillah of Poona.	Section two.

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